United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

CONSOLIDATED JOINT APPENDIX

F 034

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,170

SIDNEY BROWN, *Appellant,*

v.

DENNIS COLLINS, *Appellant.*

No. 21,189

DENNIS COLLINS, *Appellant,*

v.

FIRST NATIONAL REALTY CORPORATION, ET AL., *Appellees.*

On Appeal From a Judgment of the District Court for the District of Columbia

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INDEX TO JOINT APPENDIX

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CONSOLIDATED JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1674-'64

DENNIS COLLINS, 1630 Montague Street, N.W.
Washington, D. C., *Plaintiff*

v.

SIDNEY J. BROWN, 629 F Street, N.W.
Washington, D. C. 20004

FIRST NATIONAL REALTY CORP., A District of Columbia Corp.
629 F Street, N.W., Washington, D. C.

Serve: SAM J. EDEN, Resident Agent or SIDNEY J. BROWN,
President, 629 F Street, N.W., Washington, D. C.

REGIONAL CONSTRUCTION CO., INC., A District of Columbia
Corp., 629 F Street, N.W., Washington, D. C. 20004

Serve: EUGENIA GROGAN, Resident Agent,
629 F Street, N.W., Washington, D. C., *Defendants.*

Complaint for Slander

1. Jurisdiction is founded on Section 11-521(a) of the District of Columbia Code (Suppl. III—1964), the amount in controversy exceeding $10,000, exclusive of interest and costs.

2. The plaintiff is a resident and citizen of the District of Columbia and for a long time past, prior to March 25, 1964 and before the speaking, uttering and publishing of the false and defamatory words hereinafter mentioned, he has followed and carried on the profession of attorney at law in the District of Columbia, where he was and is a member of the bars of the District of Columbia Court of

General Sessions; the District of Columbia Court of Appeals; the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit. The plaintiff has earned his livelihood by means of his law practice in the District of Columbia, and he was a person of good character and reputation and enjoyed the respect, confidence and trust of the good and worthy citizens of the District of Columbia and of the State of Maryland.

3. The defendant Sidney J. Brown is a resident of the District of Columbia; president, director and owner of First National Realty Corp., a District of Columbia corporation; and an officer, director and owner of Regional Construction Co., Inc., a District of Columbia corporation.

4. The defendant First National Realty Corp. is a District of Columbia corporation, doing business and maintaining its principal offices in the District of Columbia.

5. The defendant Regional Construction Co., Inc. is a District of Columbia corporation, doing business and maintaining its principal offices in the District of Columbia.

6. On or about September 20, 1963 the defendant Regional Construction Co., Inc. (which, together with First National Realty Corp., is the alter ego of the defendant Sidney J. Brown) entered into a contract with United Cork Companies, a corporation, under the terms of which the latter agreed for a total price of $25,754.41 to perform certain labor and supply certain materials to a building located on Lots 1 and 2 in Square 4259 in the District of Columbia, and improved by premises 2142, 2144, 2146 Queens Chapel Road, N.E., and owned by defendant First National Realty Corp.

7. After the labor had been performed and the materials supplied under the aforesaid contract, the defendants, and each of them, failed and refused to pay to United Cork

Companies the amount which became due and owing to it under said contract.

8. Upon the failure and refusal of the defendants to pay the amount due United Cork Companies under the aforesaid contract, one George Bonhach, General Manager of the Maryland office of that organization, turned over to one Henry W. Hartlove, an attorney at law in Baltimore, Maryland, the task of collecting the aforesaid sum. Mr. Hartlove in turn, in February of 1964, employed the plaintiff for the purpose of filing in the United States District Court for the District of Columbia a mechanics' lien against the interest of the defendants in the premises which were the subject matter of the contract.

9. Acting in his capacity as attorney for United Cork Companies, the plaintiff caused to be filed and recorded in this Court on February 12, 1964 a Notice of Lien [No. 37-64].

10. Thereafter, on or about March 25, 1964 the defendant Sidney J. Brown, acting in his individual capacity and in his capacity as an agent, officer, director and owner of the defendants First National Realty Corp. and Regional Construction Co., Inc., telephoned the aforesaid George Bonhach, District Manager of United Cork Companies, who was then in Baltimore, Maryland. During the course of this telephone conversation, Sidney J. Brown, who was speaking from the District of Columbia, and who was contriving to deprive the plaintiff of his good name, credit and reputation and to bring him in disrepute among his clients, business associates and fellow attorneys, did make, speak and publish defamatory statements concerning the plaintiff by telling the aforesaid George Bonhach that the plaintiff was not concerned about money by filing said lien, but that the only reason the plaintiff filed the mechanics' lien was that he had a personal grudge against Sidney J. Brown; that the plaintiff had done Sidney J. Brown a personal injury by filing the aforesaid lien; that the plain-

tiff practices bigotry; that the plaintiff should be sued for malpractice; that the plaintiff is anti-Semitic; that approximately ten years earlier the plaintiff obtained a fraudulent judgment for $14,000 against the defendant in favor of a colored client; and that the plaintiff's actions had resulted in Sidney J. Brown being defamed in the newspaper.

11. The plaintiff is in no way guilty of the charges so falsely and maliciously made by the defendant, and said statements uttered by the defendant were and are untrue and were known by the defendant to be untrue when he made, spoke, uttered and published them.

12. As a consequence of the aforesaid telephone conversation, the aforesaid George Bonhach wrote to Henry Hartlove on or about March 31, 1964 as follows: "All of our past dealings with you [Mr. Hartlove] personally have been very satisfactory but we certainly are amazed at the character references given your Washington corespondent [sic], Mr. Collins, by Mr. Brown. Since United Cork Companies enjoys a very high prestige in the construction industry and wish [sic] only to be represented by attorneys who carry the same prestige in their field, we wish to make you aware of the accusations made against Mr. Collins by Mr. Brown on Wednesday, March 25, during a phone conversation between Mr. Brown and myself."

13. Thereafter, the aforesaid Henry Hartlove on or about April 10, 1964 responded to Mr. Bonhach as follows: "I have dealt with Mr. Collins on several occasions as I explained to you before. I have always felt that Mr. Collins was a fine person and an excellent attorney. I am not in the position, however, to investigate the allegations of Mr. Brown, so I am sending Mr. Collins notice of dismissal from the United Cork action in Washington at once."

14. On or about the same date, the aforesaid Henry Hartlove wrote to the plaintiff as follows: "I sent you a

a copy of a letter I received from United Cork Companies in which I was questioned as to your character, and your ethics as an attorney. I have been asked to give an immediate answer regarding the allegations of Mr. Brown of the First National Realty Company which were contained in that letter. Mr. Collins, in my dealings with you, I certainly could not believe that these statements are true, but I am not in the position to investigate them. In order that I do not jeopardize myself with my client, I must ask that you withdraw from the case immediately. I have notified United Cork of your dismissal." Whereupon the plaintiff was forced to and did withdraw as counsel for United Cork Companies.

15. The matter so spoken, uttered and published by the defendant during the aforesaid telephone conversation described in Paragraph 10 above was and is, and the defendant knew and should have known it to be, untrue, false, defamatory and slanderous per se, in that it carried the imputation of a serious crime and imputations affecting the plaintiff's competence, ethics and integrity in his business and profession as an attorney at law.

16. The aforesaid defamatory and slanderous communication was made by the defendant maliciously and with a wanton and reckless disregard of the truth and with the purpose and effect of injuring and undermining the good reputation of the plaintiff; of damaging his good name and his professional and social standing; of bringing him into disrepute; of causing him to lose the esteem, confidence and respect of his clients, fellow attorneys, business associates and neighbors; of holding the plaintiff up to the hatred, scorn, contempt, disdain and ridicule of his neighbors, clients, business associates and fellow attorneys in the District of Columbia and in the State of Maryland, and among the other good and worthy citizens of the District of Columbia and of the State of Maryland; of causing the plaintiff to lose the representation of his clients, with

an attendant loss of the fees for his professional services which he would thereby earn, and with the particular and special damage of causing him to lose a sum of money equivalent to a fair and reasonable legal fee for the services he would have rendered as the attorney for United Cork Companies in its effort to collect the sum due under the contract described in Paragraph 6 above; and of causing the plaintiff embarrassment, humiliation, mental suffering and anguish.

WHEREFORE the plaintiff demands judgment against the defendants, and each of them, in the amount of Five Hundred Thousand Dollars ($500,000) as compensatory damages, and Five Hundred Thousand Dollars ($500,000) as punitive damage, and costs.

HILLAND, MACK & HOGAN

By /s/ ARTHUR J. HILLAND
Arthur J. Hilland
410 Shoreham Building
Washington, D. C. 20005
NAtional 8-7621
Attorneys for Plaintiff

Jury Demand

The plaintiff demands a trial by jury on each and all of the issues raised by this Complaint.

HILLAND, MACK & HOGAN

By /s/ ARTHUR J. HILLAND
Arthur J. Hilland

[Filed August 12, 1964]

Answer to Complaint

First Defense

The Complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

The conversation of which the plaintiff complains was in the exercise of a qualified privilege without actual malice.

Third Defense

Defendants deny uttering or publishing anything defamatory to the plaintiff.

Fourth Defense

Answering the allegations of the Complaint, the defendants state as follows:

1. Defendants admit that the amount claimed as damages exceeds the sum of Ten Thousand ($10,000) Dollars.

2. Defendants admit that the plaintiff is an attorney at law in the District of Columbia and at all times material herein was a member of the bars of the Courts specified in the Complaint. The Defendants are without knowledge sufficient to form a belief as to the remaining allegations to paragraph 2 and therefore deny the same.

3. Defendants admit that the defendant Sidney J. Brown is a resident of the District of Columbia and deny all other allegations therein.

4. Defendants deny the allegations of paragraph 4.

5. Defendants admit the allegations of paragraph 5.

6. Defendants admit that on or about September 20, 1963 defendant Regional Construction Co., Inc. entered into a contract with United Cork Companies, a corporation, as more fully described in the said contract. Defendants deny the remaining allegations of paragraph 6.

7. Defendants deny the allegations of paragraph 7.

8. Defendants are without knowledge sufficient to form a belief as to the truth or falsity of paragraph 8 and therefor deny the same.

9. Defendants admit that the plaintiff caused to be filed and recorded in the United States District Court for the District of Columbia a notice of lien No. 37-64.

10. Defendants admit that the defendant Sidney J. Brown acting in his individual capacity telephoned one George Bonhach, District Manager of United Cork Companies in Baltimore, Maryland, on or about March 25, 1964 but defendants deny the remaining allegations of paragraph 10.

11. Defendants deny the allegations of paragraph 11.

12. Defendants neither admit nor deny the allegations of paragraphs 12, 13 and 14, not having information sufficient to form a belief and therefore demand strict proof thereof.

13. Defendants deny the allegations of paragraphs 15 and 16.

WHEREFORE, the premises considered, defendants demand that the case be dismissed and that they be awarded their costs.

BERNSTEIN, KLEINFELD & ALPER

By SHELDON E. BERNSTEIN
Sheldon E. Bernstein
1725 Eye Street, N.W.
Washington, D. C.
Attorneys for Defendants

Pretrial Proceedings

THE DEFENDANTS deny that there was any malice in any statement that may have been made; assert that any statement made by Brown was true and they rely on truth as a defense; * * *

Praecipe

The Clerk will please enter on the docket in the above entitled case that the plaintiff, Dennis Collins, stipulates to a remittitur of $20,000 in respect to the verdict of $30,000 as punitive damages, thereby reducing said punitive damages to $10,000, this remittitur being filed in accordance with the Opinion of this Court filed herein on May 24, 1967.

DENNIS COLLINS
Dennis Collins
Plaintiff

Order

This matter came on to be heard upon the defendant Sidney J. Brown's Motion for New Trial, or in the Alternative, for a Remittitur; and it appearing to the Court that a new trial should be granted unless the plaintiff stipulates to a remittitur of $20,000 in respect to punitive damages, thereby reducing the jury verdict of $30,000 as punitive damages to $10,000 as punitive damages; and it further appearing to the Court that the plaintiff has filed his stipulation to such remittitur, it is by the Court this 7th day of June, 1967

ORDERED that said Motion be, and it hereby is, denied; and it is further

ADJUDGED that the plaintiff, Dennis Collins, recover of the defendant Sidney J. Brown the sum of Fifteen Thousand Dollars ($15,000.00) as compensatory damages and the sum of Ten Thousand Dollars ($10,000.00) as punitive damages, together with costs.

.....
United States District Judge

The Court: Mr. Mack, why are all these corporations joined as defendants? Your opening statement certainly doesn't cover them and it seems to me a slander of the kind that you claim was made here certainly must have been made by Mr. Brown, if it was made, in his individual capacity.

Mr. Mack: He is the sole stockholder and president of the corporations.

The Court: That does not make the corporations liable.

Mr. Mack: It is our contention that when he made this call he also made it on behalf of First National Realty and Regional Construction Company.

The Court: You just now said that Mr. Brown is worth a couple million dollars, so you are not afraid that you might get a judgment that you can't collection.

I don't see what basis you have for joining the corporations. Actually, I think you are only complicating your action.

I am not ready at this time to direct a verdict in favor of the corporations, but I shouldn't be surprised if at the close of the plaintiff's case that would be the outcome.

Mr. Hayes: I was about to ask Your Honor to let me come to the bench to make a request for a verdict in their favor on his opening statement.

The Court: Ordinarily motions for a directed verdict on the opening statement are not favored unless it is absolutely clear from the opening statement that there can be no liability.

Mr. Mack just stated that he claims that this was made in behalf of the corporations, that these statements were made in behalf of the corporations. While the fact may be incredible, I don't think that the Court is in a position to direct a verdict.

But what do you say about this?

Mr. Mack: I say it's a very close question, Your Honor, and our evidence may not be sufficient to keep them in, but

I would suggest that there is some evidence tending to show that they should be parties.

The Court: What good is it to you whether it is or not?

Mr. Mack: It would make a judgment easier to collect, Your Honor, because none of Mr. Brown's property is in his name.

The Court: I imagine that a man conducting a
22 whole lot of business, like Mr. Brown apparently does, apparently he is in the real estate business, can't afford to have an unpaid judgment against him, because no bank would do business with him or any other firm. So I wouldn't worry too much about that.

Well, you have a right to prove your case, of course. I always like to streamline a case if I can.

Mr. Mack: I don't expect to waste any of the Court's time in this extraneous effort, if Your Honor please.

The Court: I want to say to both of you that we must not go off on tangents like how good that old claim was and that sort of thing. I think we ought to confine ourselves strictly to the issues.

Well, on the basis of the facts as you state them in your opening statement I have grave doubt as to the liability of the corporations. However, I think it would be premature for me to direct a verdict in their favor at this time.

• • • • • • • • • • •

27 **George Bonhach**

called as a witness by plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

Q. Will you tell us your name, your age, and where you live, sir?

The Court: I don't seen any reason for asking witness' ages unless they are under 21. A. George Bonhach; age 43; my address is 20 Tall Tree Road, Middletown, New Jersey.

Q. Are you employed, sir? A. Yes.

Q. What is your occupation or profession? A. National Sales Manager for my company.

Q. What is that company? A. BASF Colors and Chemicals.

Q. Where are your offices?

The Court: Will you give the name of the company again, please?

The Witness: Just the four letters BASF. It's a German corporation. BASF Colors and Chemicals.

28 By Mr. Mack:

Q. And where is your office, sir? A. 866 Third Avenue, New York City.

Q. Were you at one time employed by United Cork Companies? A. Yes.

Q. When did you begin your employment with them? A. In 1958.

Q. And when did you terminate your employment with them? A. I never have. My old company, United Cork Companies, was absorbed by BASF.

Q. Were you assigned to the Baltimore Regional Office of United Cork Companies? A. Yes.

Q. For how long were you assigned to that post? A. 1958 until 1964.

Q. What was your job in that office? A. District Manager of the office.

Q. In your capacity as District Manager did you have any contact or participate in a contract between United Cork Companies and Beltway Regional Center? A. Yes.

Q. What was the contract for, just generally?

29 A. Generally cold storage and construction work.

Q. And who was to do the work? A. United Cork Companies.

Q. And where was the work to be done? A. At the Rath Packing Company building in Washington.

Q. Do you recall the address? A. This was 1964. I am afraid I don't.

Q. Do you recall whether it was 2142 or 2146 Queens Chapel Road, Northeast? A. I recall Queens Chapel Road. I don't recall the address.

The Court: What was the name of that concern?

Mr. Mack: Beltway Regional Center, Your Honor.

By Mr. Mack:

Q. Who participated from United Cork in negotiating the contract? A. I did that personally.

Q. With whom did you negotiate? A. Mr. Zeiba, who was employed by Beltway Regional Center, and Mr. Brown.

Q. And that name is Z-e-i-b-a, is it not? A. I think it's S-z-e-i-b-a. I am not sure.

30 Q. Where were his offices? A. On F Street, at the First National Realty Company building.

Q. Did United Cork Companies do the work? A. Yes.

Q. What was the amount of the bill for the work that was done? A. To my closest recollection, $25,700.

Q. After the job was completed was the bill paid? A. No, it was not.

Q. And what, if anything, did you do in an effort to see that payment was made? A. Many, many calls were made to the offices of the First National Realty Company, discussing it with Mr. Zeiba and Mr. Sidney Brown, as to why it was not paid and requesting that payment be made.

Q. Did you visit that office on occasion, too? A. Yes.

Q. When the bill was not paid what, if any, instructions did you receive from your company? A. The instructions I received from my company were that if I could not see that the bill would be paid prior to our lien rights running out in the District of Columbia, that I was to engage

31 an attorney to place a lien on the building within the time of the lien rights.

Q. Will you explain what you mean by the time running out on your lien rights? You are not a lawyer, sir, of course. A. Legally, no, but if you do construction work or work in a building—

The Court: I think the Court will take judicial notice and can explain to the jury that a lien has to be filed within a certain limited time after the work is finished.

Mr. Mack: Thank you, Your Honor.

By Mr. Mack:

Q. I believe you said that if this was not accomplished, payment before the time for the lien rights had expired, that you were authorized to hire an attorney? A. If I hadn't collected my money before the lien rights had expired, I was authorized to hire an attorney.

Q. And did you then engage an attorney? A. Yes.

Q. Whom did you engage? A. Mr. Henry Hartlove.

Q. Where were his offices at the time? A. In Baltimore.

Q. And did Mr. Hartlove handle the case for you
32 himself? A. No. He had handled previous cases for me in Maryland, but advised me that he would have to obtain a correspondent in Washington.

Q. And did he make some communications on behalf of United Cork Companies to retain an attorney in Washington? A. Yes.

Q. And as a result of those communications who was employed? A. Mr. Dennis Collins.

Q. Now had you talked to Mr. Collins or ever met him prior to the time Mr. Hartlove engaged him? A. I have not met Mr. Collins to date. I have never met him.

Q. You have never met him? A. No.

Q. Have you ever spoken to him on the telephone? A. No.

Q. Have you ever had any direct communication with him, a letter to him or a letter back from him? A. No.

Q. Well, sir, this is Mr. Collins at the end of the table.

A. How do you do.

33 Q. Now were you advised, after Mr. Collins was employed, as to what steps he had taken to protect the rights of United Cork Companies? A. Yes.

Q. And what were you advised, sir? A. I was advised

by Mr. Hartlove that Mr. Collins had succeeded in placing a lien on the property and that he had also—

Mr. Hayes: If Your Honor please, I am concerned about conversations that will go too far.

The Court: Objection overruled.

By Mr. Mack:

Q. You may continue your answer, sir. A. And that from his experience that he had also included Mr. Brown personally in the lien.

Q. Now what was the first conversation that you had with Mr. Brown after you learned that the lien had been filed and Mr. Brown had been named? When was it, I should say?

The Court: You are assuming the fact that there was a conversation.

Mr. Mack: Let me withdraw that question.

Q. Did you have any conversation with Mr. Brown after the time that you were informed that a lien had been
34 filed and Mr. Brown had been put on the lien? A. Yes.

Q. You did have a conversation. When was it, sir? A. March 25th, 1964.

Q. Where was it? A. I was in my office in Baltimore.

Q. Where was Mr. Brown? A. I don't know. He called me by phone.

Q. It was a telephone conversation, then? A. Yes, sir.

Q. And what time of the day was it? A. It was after five because the office personnel had gone home and I was working late.

Q. Can you tell us how long the conversation took? A. By minutes, no. It was lengthy, approximately 20 minutes, I'd say.

Q. Will you tell us what the conversation was? A. Well, the conversation was mostly carried on by Mr. Brown. He was extremely incensed that—

The Court: No; suppose you just tell us what he said, without characterizing it.

The Witness: Oh. All right.

The Court: As near as you can remember.

35 The Witness: All right. He was upset over the fact that I had hired—or that Mr. Hartlove had hired Dennis Collins—

Mr. Hayes: If Your Honor please, I suggest the gentleman is not following Your Honor's instruction. He again is characterizing—

The Court: Tell us as near as you can remember what Brown said, using Brown's own words, in quotation marks, in other words.

The Witness: Your Honor, this was in 1964.

The Court: I understand, but do your best. Don't just paraphrase what he said. Your testimony is very important and as near as you can remember tell us what he said in his own words, as near as you can remember. We understand you can't remember exactly.

The Witness: I think I understand what you mean.

He did not—this is a little hard to express without the sentiments behind it.

The Court: Just use his words as near as you can remember, without characterizing them.

The Witness: He informed me that he had had business with Dennis Collins in the past; that Dennis Collins obtained a fraudulent judgment against him in favor

36 of a colored client in the amount of $14,000; that Dennis Collins should be sued for mal-practice; that Dennis Collins practices bigotry.

There were other remarks that I don't recall just at this time; but I made original notes of these, Your Honor—

By Mr. Mack:

Q. Let me ask another question—

The Court: You have a right to consult your notes if you have them with you.

The Witness: This would help.

Mr. Mack: If Your Honor please, I believe they are in

the original copy of Mr. Bonhach's deposition which is on file in this Court and perhaps the Clerk has it here.

The Court: The deposition is here, but if the witness has his notes with him he can consult them.

Mr. Mack: His notes were taken at the time his deposition was taken, Your Honor.

The Court: Do you have your notes with you?

The Witness: No, they are in the deposition.

Q. Sir, I am showing you a deposition dated August 20, 1964, deposition of George Bonhach. Will you turn to the back of that deposition and I believe you will find
37 some papers under the envelope. A. Yes.

Mr. Mack: May the witness be permitted to remove his notes from the deposition, Your Honor?

The Court: Yes, just so long as you see to it that they are restored after the witness is through with them.

Mr. Mack: I shall, Your Honor.

Would you remove from the deposition the notes that you have just been referring to?

(The witness complied.)

Mr. Mack: May I have them, please?

The Witness: Yes.

Mr. Mack: May these be marked as Plaintiff's Exhibit No. 3 for identification, Your Honor?

The Court: You are not going to offer it in evidence.

Mr. Mack: No, Your Honor.

The Court: He has a right to consult these notes or anything else to refresh his recollection. A document that is used to refresh his recollection does not have to be marked.

Mr. Mack: Very well, Your Honor.

By Mr. Mack:

Q. Will you examine your notes, Mr. Bonhach, and tell us when you have finished examining them?
38 A. I have finished.

The Court: No, just proceed with your examination. He may consult his notes in connection with answering your questions.

By Mr. Mack:

Q. Will you continue, sir, in telling us what Mr. Brown said to you during this telephone conversation? A. Yes. He said the reason that Mr. Collins took the case against him was that he was not concerned about the money he would receive as a fee for the case but he took it because he had a personal grudge against him, meaning Mr. Sidney Brown.

Mr. Brown also said that this was not his debt but the debt of the First National Realty Company and he should not have been included in the lien rights—or the lien.

He also said that Dennis Collins saw fit to defame him in the papers, in the newspapers, because of the lien, and he had sent the whole thing to his attorney for a defamation suit.

That would conclude the remarks.

Q. Is there any reference in your notes to the words anti-Semitism?

The Court: Mr. Mack, I am going to exclude that
39 question. It is not a proper question. He is not testifying what the notes say, he is using the notes to refresh his recollection. That question is excluded.

Mr. Mack: Very well, Your Honor.

By Mr. Mack:

Q. Did Mr. Brown say anything in that conversation about anti-Semitism? A. I recall very clearly—I did not make a note of it at that time—that he said Mr. Collins was anti-Semitic.

Q. Now I believe you testified that Mr. Brown said that Mr. Collins obtained a fraudulent judgment. Did he say anything about the claim itself that Mr. Collins had filed against Mr. Brown? A. The only thing that I recall he said was that he should not have included his name personally in the lien.

Are you referring to the lien?

Q. No, sir, I am speaking about the old case. A. Oh. A fraudulent judgment for $14,000, that he had obtained a fraudulent judgment for $14,000 in favor of a colored person.

The Court: I don't think you should have repetition. He said it once; that is enough.

Q. Following the receipt of that telephone call
40 what, if anything, did you next do in connection with this case? A. I wrote a letter to Mr. Hartlove, who was representing me in Baltimore, and advised him—

Q. Well, you wrote a letter. Do you recall the date of the letter? A. That was March 31st, to the best of my knowledge.

Q. I show you what's been marked Plaintiff's Exhibit No. 1 for identification. Can you identify that letter, sir? A. Yes.

Q. What is that letter? A. That is the letter I wrote to Mr. Hartlove.

Q. And is that your signature on the letter? A. Yes.

Mr. Mack: I offer it in evidence, if Your Honor please.

The Court: Show it to the other side.

(Pause.)

Mr. Hayes: If Your Honor please, I want to object.

The Court: May I see this?

Mr. Hayes: Yes, of course.

The Court: What is the ground of your objection?

Mr. Hayes: Well, one, it's a communication between an attorney and client. I don't think it amounts to publication.

41 The Court: Well, that is the client's privilege and nobody else's.

Any other objection?

Mr. Hayes: Well, it is in the nature of re-publication rather than publication. I would want the record to show I made the objection on that ground.

(Pause.)

The Court: I am going to ask counsel to come to the bench.

(At the Bench:)

The Court: Of course this is hearsay in a way, Mr. Mack. On what theory do you claim this is admissible?

Mr. Mack: Not for the truth of the facts contained in the letter relating to the slander, but to show what happened to Mr. Collins, the communication from the client to the attorney and back.

I would have no objection to Your Honor telling the jury this does not prove that the slander took place.

The Court: Let's be brief. Is it your point that this goes to the issue of damages?

Mr. Mack: Yes, Your Honor.

The Court: Well, I think it is admissible on that issue because according to the opening statement Mr.
42 Collins was discharged as a result of these statements, and this leads up to the alleged discharge, is that it?

Mr. Mack: Yes, Your Honor.

The Court: Very well, I will admit it.

Mr. Hayes: Will the admission be with the instruction to the jury that it is only for the question if they find—

The Court: Yes.

(In Open Court:)

The Court: The objection is overruled. The Court will admit this letter in evidence, but only for a limited purpose: not as proof of the facts therein stated, but merely as evidence tending to show the damage caused or claimed to have been caused to the plaintiff as a result of the alleged statements. With this limitation this letter is admitted, and the jury is instructed that they may consider this letter only for the purpose of determining what, if any,

damage was caused to the plaintiff as a result of the alleged statements which Brown is claimed to have made.

(Plaintiff's Exhibit No. 1 for identification was received in evidence.)

The Court: You may read this to the jury if you wish.

Mr. Mack: May it please Your Honor, ladies
43 and gentlemen of the jury, this document is Plaintiff's Exhibit No. 1, on the letterhead of United Cork Companies, Baltimore, Maryland, dated March 31, 1964. It is addressed to Mr. Henry Hartlove, 102 Dale View Court, Timonium Post Office, Maryland, 21093, and it reads as follows:

> Dear Henry: I spoke with Mr. Brown of the First National Realty Company in reference to the amount of money which he promised to pay us prior to April 1 and in regard to the lien which we have instituted against the Rath Packing Company in order to insure the collection of our money. Mr. Brown took exception to the fact that you placed a lien against the Rath Packing Company building and informed me that he has placed the matter of the lien in the hands of his attorney, Mr. Sheldon Bernstein of Washington, D. C. for the purpose of considering a defamation of character suit against United Cork Companies.
>
> All of our past dealings with you personally have been very satisfactory, but we certainly are amazed at the character references given your Washington correspondent, Mr. Collins, by Mr. Brown.
>
> Since United Cork Companies enjoys a very
> 44 high prestige in the construction industry and wish only to be represented by attorneys who carry the same prestige in their field, we wish to make you aware of the accusations made against Mr. Collins by Mr. Brown on Wednesday, March 25, during a phone conversation between Mr. Brown and myself. The following remarks were written down by me during the

course of the phone conversation and are actual quotes by Mr. Brown:

Remark 1—Mr. Collins is not concerned about money by filing this lien. The only reason he did it, he has a personal grudge against me.

Remark 2—Mr. Collins has done me a personal injury by filing a lien against the Rath Packing Co.

Remark 3—Mr. Collins practices bigotry.

Remark 4—Mr. Collins should be sued for malpractice.

Remark 5—Mr. Collins is anti-Semitic.

Remark 6—Approximately ten years ago Mr. Collins obtained a fraudulent judgment for $14,000 against me in favor of a colored client.

Remark 7—Mr. Collins' actions resulted in my being defamed in the paper.

In view of the above quotations, Henry, I would
45 appreciate an immediate answer from you as to the type of person you have hired to represent us in this matter.

Very truly yours, George Bonhach, District Manager.

By Mr. Mack:

Q. Did Mr. Hartlove reply to that letter, sir? A. Yes, he did.

Q. I show you what has been marked Plaintiff's Exhibit No. 2 for identification. Can you identify that letter? A. Yes.

Q. Do you recognize the signature on it? A. Yes.

Q. Whose signature is it? A. Mr. Henry Hartlove's.

Q. And who is the letter addressed to? A. To myself.

Mr. Mack: I offer it in evidence, Your Honor.

The Court: Show it to the other side.

(Pause.)

Mr. Hayes: If Your Honor please, if Your Honor's instruction will be for the same limited purpose—

The Court: I want to see this first.

(Pause.)

46 The Court: I will admit this on the issue of damages, with the limited purpose of showing what damages, if any, the plaintiff sustained as a result of the alleged defamatory statements, and the jury is instructed that that is the purpose of admitting this letter.

(Plaintiff's Exhibit No. 2 for identification was received in evidence.)

The Court: You may read it to the jury if you wish.

Mr. Mack: Ladies and gentlemen of the jury, this document is marked Plaintiff's Exhibit No. 2 in evidence and it is on the letterhead of Henry W. Hartlove, Attorney at Law, and it's addressed to Mr. George Bonhach, General Manager, United Cork Companies, 806 DeSoto Road, Baltimore, Maryland:

> Dear George: In answer to your letter of March 31st, 1964 in reference to my Washington correspondent, Mr. Collins, I have dealt with Mr. Collins on several occasions, as I explained to you before. I have always felt that Mr. Collins was a fine person and an excellent attorney. I am not in a position, however, to investigate the allegations of Mr. Brown, so I am sending Mr. Collins notice of dismissal from the United Cork action in Washington at once.
>
> Very truly yours, Henry W. Hartlove.

47 By Mr. Mack:

Q. I neglected to ask you one question, sir, concerning the telephone conversation of March 25, 1964. How many times were these statements which you have related to us made by Mr. Brown? A. During the course of the conversation they were repeated three or four times.

Q. Did you after receiving the letter from Mr. Hartlove go to see Mr. Brown? A. Yes, I did.

Q. Where did you go to see him? A. In Mr. Brown's office on F Street in Washington.

Q. Will you tell us when it was, as best you can recall? A. Shortly after receiving the letter. I couldn't give you a date.

Q. Who was present during this conversation? A. Mr. Brown and myself.

Q. What was the conversation, sir? A. I informed Mr. Brown that Mr. Collins had been released from the case or relieved of the case and that I would now like to enter into negotiations as to when we could collect the monies due us.

Q. What, if anything, did Mr. Brown say when
48 you told him that Mr. Collins was no longer in the case? A. He said that was fine.

Q. Will you continue to tell us what was said during the course of this conversation? A. As close as I can remember, the conversation related to ways and means of which Mr. Brown would pay the money that he owed our company.

Q. Was there any discussion about Mr. Collins by Mr. Brown? A. I really couldn't say.

Q. Did you have further conversations after that with Mr. Brown in his office in Washington, D. C.? A. Yes.

Q. And during any of those telephone conversations did Mr. Brown make any remarks concerning Mr. Collins? A. I couldn't say.

Mr. Mack: Would Your Honor indulge me for one moment?

The Court: Surely. Take whatever time you need.

(Pause.)

By Mr. Mack:

Q. Did you subsequently or did your company subsequently employ another attorney to represent
49 United Cork Companies? A. Yes, they did.

Q. And was there a collection made on account of

the claim of United Cork Companies? A. Yes, there was.

Q. Do you happen to recall the amount that you actually received? A. The best indication I can give you was it was considerably less than the original amount owed us.

Q. Now did there come a time when you discussed with Mr. Brown the fact that Mr. Collins was bringing an action against Mr. Brown? A. Would you repeat that question?

Q. Did there come a time when you discussed with Mr. Brown the fact that Mr. Collins had threatened to file an action against Mr. Brown? A. No, to the best of my knowledge, not exactly in that category.

Q. Well, specifically referring to your letter of March 31, 1964, did you ever discuss the location of that letter with Mr. Brown, your file copy of it? A. Mr. Brown had asked me for a copy.

Q. Yes, sir. Will you tell us what that conversation was, where it was, and when it took place?

50 The Court: No, ask one question at a time, please.

By Mr. Mack:

Q. When did the conversation take place, sir? A. I can't remember dates this far back, but within the general scope of the events occurring up until now, I would say, within a week or two of Mr. Collins being relieved.

Q. And where was the conversation? A. In Mr. Brown's office.

Q. And what conversation did you have with Mr. Brown about your March 31, 1964 letter? A. Well, Mr. Brown had agreed to pay the amount he owed us and had arranged—

Q. In full? A. Yes. And had arranged with my company to have notes presented, a series of notes where he would pay so much a month on the bill until it was paid.

I went to his office with the notes and instructions from my company, whose headquarters were in New Jersey at that time, and expected Mr. Brown to sign the notes. He

told me that he had been aware or made aware of the fact that I had written the letter to Mr. Hartlove and he wanted to know what was in the letter.

Previously I had told Mr. Brown that I had written
51 a letter outlining his remarks to Mr. Hartlove. I recall this. I told him that I would not give him a copy. He wanted a copy of the letter. He wanted to see what was in it, and I told him that the statements he made to me over the phone were contained in the letter.

Q. What, if anything, did he say? A. He said, well—I can't quote the exact—does it have to be an exact quotation?

Q. Give us the best recollection you have of what he said. A. To the best of my recollection he said, I know I said some things I shouldn't have said, but now I have to find out what I said.

Q. And you were telling us now about the meeting when you were taking the notes to Mr. Brown and you had a further discussion about this letter, I believe. A. Yes. He said that he would have signed these notes had he not found out about the letter, but now he would not sign the notes until I produced a copy of the letter.

Q. And did you give him a copy of the letter? A. No, I told him that I couldn't locate a copy of the letter.
52 Q. Was that true? A. No, it was not.

Q. Why did you not give it to him? A. For the simple reason that at that time, since it was in the hands of the company attorney, I didn't feel that I should make a move without talking to the attorney about it.

Q. Do you recall when your deposition was taken on August 20, 1964? A. Yes.

Q. Did you have any conversation with Mr. Brown—or let me put it this way: what were the conversations closest in time before your deposition with Mr. Brown? A. Just prior to the time, I'd say maybe a week before the deposition was to have been taken, I received a phone call from Mr. Brown. Again I was in my office. And he asked that

I meet with him in Baltimore since he was coming to Baltimore for dinner, that he had some things he wanted to discuss with me, and I told him I had a death in the family and wouldn't be free that evening, but I would like to discuss—I asked him what he wanted to discuss and the answer was noncommittal, and I said, Well, I would like to discuss the collection of my money if you do come over. So I gave him my home phone number as to where he could reach me if he did come to Baltimore, that
53 we would discuss the payment of the money. In this conversation I had told him that the company attorney had advised me under no circumstances to meet with him for the discussion of the lien, this was in their hands. And his answer was to the effect that your company would not be adverse to your picking up a check for the debt. And I said, Well, how much are you talking about? He said, The full amount. I said, No, I don't think they would be adverse to that.

But I did not hear from Mr. Brown that evening at my home.

Q. Did you have any telephone call after that and prior to your deposition? A. Yes, several days later Mr. Brown called and asked that I meet with him in Washington for lunch. I told him again that I had been advised by my company attorneys that I was not to meet him under any circumstances. And he said, Well, we can meet away from my office or someplace where no one would see us. And I declined the invitation and did not meet him.

Q. Did these conversations take place before or after you were notified that your deposition was to be taken in this case? A. After.

Q. Sir, did you believe Mr. Brown as to the things
54 he said about Mr. Collins in this telephone conversation?

Mr. Hayes: If Your Honor please—

The Court: Objection overruled. I think this is proper on the question of damages.

Mr. Hayes: The only thing that I would suggest, one of the reasons—

The Court: I will overrule the objection. I think this is proper on the issue of damages.

Mr. Hayes: There is a written statement.

The Court: You may answer.

The Witness: I had no way to believe or disbelieve these statements since I had just met Mr. Collins for the first time today; but it did leave some doubt in my mind as to the caliber of the attorney Mr. Hartlove had selected for representation in this matter.

Mr. Mack: Will Your Honor indulge me for one moment? I believe I have completed.

The Court: Take whatever time you need.

(Pause.)

Mr. Mack: I have no further questions, Your Honor.

The Court: Well, I think this might be a logical time for us to suspend for our luncheon recess, and you may cross-examine the witness after the luncheon recess.

(At 12:30 p.m. trial stood in recess, to reconvene at 1:45 p.m.

AFTERNOON SESSION

(1:55 o'clock)

* * *

The Court: You may bring in the jury.

(Jury in the box.)

The Court: The witness may resume the stand.

Thereupon,

George Bonhach

resumed the witness stand and testified further as follows:

The Court: Mr. Hayes, you may proceed with your cross examination.

Cross Examination

By Mr. Hayes:

Q. Mr. Bonhach—is that the right way to pronounce it, sir? A. Yes.

Q. You are connected presently as I understand it with a B.A.S.F. Company, and that company took over United Cork; is that correct, sir? A. Yes, that's right.

Q. Now, what is your present relationship with
57 the company? A. I am General Sales Manager for the company.

Q. And were you General Sales Manager for United Cork? A. No. I was District Sales Manager.

Q. You were District Sales Manager? A. Yes.

Q. And this included the district of Maryland and the District of Columbia? A. Yes, sir.

Q. Now, you negotiated this contract as I understand it? A. Yes.

Q. With the Beltway Region? A. Yes.

Q. And were you involved as far as commission was concerned? A. Yes.

Q. So that as to the amount collected, you obtained a certain percentage of it; is that right? A. Yes.

Q. Now, when Mr. Collins was brought into the picture I think you said that you did not know Mr. Collins, he was brought in through Mr. Hartlove? A. Yes.

58 Q. And you had not known him prior to that time at all? A. No.

Q. Was he brought in for the purpose of filing a mechanics lien? A. No.

Q. He was not? A. He was brought in for the purpose of collecting the money that Mr. Brown owed me.

Q. I call your attention to a deposition taken, Mr.

Bonhach, on August 20th, 1964, on page 15, in which this was your testimony, I believe:

"Answer: I was advised by Mr. Wilson that he had authorized Mr. Hartlove to proceed with placing of a lien on this building.

"Question: You received that information from the comptroller?

"Answer: That's correct.

"Question: Then what was the next conversation that you had with anybody concerning this matter?

"Answer: I wouldn't recall from a November conversation word for word—

59 "Question: Well, we are not in November anymore Mr. Bonhach. I'm asking about conversations after Mr. Hartlove informed you that he had retained Mr. Collins and for conversations after the comptroller of your Company informed you he had authorized the filing of a lien.

"Answer: Well, eventually—I don't know exactly how long, but Mr. Hartlove informed me Mr. Collins had taken steps to file the lien, or had filed the lien."

Now that I have read that to you, sir, does that refresh your recollection whether or not he was employed for the purpose of filing the lien? A. To answer your question as to my understanding of why we hired Mr. Collins, we hired Mr. Collins to collect our money. If filing the lien was necessary, then this was part of collecting the money.

Q. Well, you were negotiating, I believe, for the amicable adjustment of it at the time when this came about;

60 is that right? A. No. I think there was no further negotiations for the amicable collection, that's why we hired an attorney.

Q. No. But I mean prior to the time that Mr. Collins came into the picture you had been negotiating? A. Yes.

Q. And were attempting to amicably collect the money? A. Yes.

Q. And had Mr. Brown at that time agreed to personally go on the notes? A. Since 1964—if you ask me to definitely specify exact timing, I couldn't answer this. Prior thereto Mr. Brown had agreed to go on the notes, yes. Mr. Brown had agreed to go on the notes and personally endorse those notes along with his company.

Q. In other words he had agreed, aside from the fact that the Regional was involved, that he would personally go on the notes? A. No; in addition to Regional.

Q. Well, in addition to, sir? A. Yes.

Q. And this was prior to the time that there had been conversation with respect to the filing of liens? A. I didn't understand your question.

61 Q. This was prior to the time that there was a discussion had with respect to the placing of a lien? A. No, that was afterwards.

Q. It was after the time? A. It was afterwards.

Q. Are you certain of that, sir? A. I am fairly well certain, because when I took the notes in to Mr. Brown to be signed, he had told me that he had heard I had written a letter to my attorney regarding his remarks about Mr. Collins.

Q. Well, when you went in then, as I said, you had taken notes because of something you all had previously agreed upon? A. Yes.

Q. All right, sir.

Now, with respect to the conversation had by you and Mr. Brown, between you and Mr. Brown, did he indicate to you that Mr. Collins had filed a mechanics lien and that instead of simply naming the property, that he had put his name personally on the lien? A. He did.

Q. And did he say to you that this had gotten into
62 the credit reports? A. He did.

Q. So that when he speaks of the question of the paper to which you made reference, he called your attention to the fact that this naming of him personally had gotten into the credit reports affecting his credit adversely? A. He did, yes.

Q. Now, did he at that time say to you that he had taken or was taking this matter up with his attorney because in his opinion this amounted to a defamation as far as he was concerned? A. Not in those words. He told me that he would give this to his attorney for defamation suit against my company.

Q. And that was based upon the fact that his name personally had been placed on a mechanics lien which he took the position was not in accordance with what is usual procedure? A. I couldn't tell you why he made this statement because he didn't explain it to me.

Q. He did not say to you that the question of putting a person's name on it was not the usual procedure? A. I don't recall whether he did or not.

Q. But you don't say that he didn't? A. I can't; no.

63 Q. All right.

Now, when you took the notes, Mr. Bonhach, you didn't attempt, did you, to take down verbatim what was said by Mr. Brown, you simply made notes to call your attention to that so you might later along indicate what he had said? A. Yes.

Q. Is that right? A. That's right.

Q. Now, let me ask you this, sir: Didn't he tell you that Mr. Collins had represented clients who had sued him in a suit for fraud? A. No, he did not.

Q. He did not? A. No.

Q. You mean by that, I take it, that he did not tell you that somebody had sued him for fraud? A. He did not.

Q. What did he tell you, sir? A. I have it here, if I may refer to my notes?

Q. Yes, sir. A. He said that Mr. Collins had obtained a fraudulent judgment against Mr. Brown in the amount of $14,000 on behalf of a colored client.

64 Q. And he did not say that the suit was a suit brought against him by the clients for fraud? A. I just told you exactly what he said.

Q. Well, you mean the reference to those notes make you know exactly what he said? A.Yes.

Q. Well, does the reference to those notes make you know exactly these other words that were said as far as your testimony is concerned, the notes that you then made? A. I don't understand your question.

Q. Do these notes purport to be the statements of what was exactly said or what you made as your interpretation of what was said? A. They would be the essence of what was said, the basic essence of what was said. There may be a word or two which could be different, but this is basically the comments he made.

Q. And based upon the reference to your note, you now say that he did not say that the suit was for fraud as against a fraudulent suit? A. No, he did not say that.

Q. All right, sir.

65 Did he say to you that Mr. Collins had a personal grudge against him and he didn't desire to have any dealing with him? A. No. He said that Mr. Collins took this case not for the money he would be paid as a fee, but because he had a personal grudge against Mr. Brown.

Q. And did he tell you, sir, that he did not want to deal with you with respect to the attempted settlement because of Mr. Collins' contact in the case? A. I couldn't answer that honestly.

Q. Well, wasn't that the very purpose of the conversation had with him, and didn't you in turn notify Mr. Hartlove that because of the fact that you were not able to investigate this matter you were suggesting that Mr. Collins be removed from the case? A. The purpose of his phone call was to advise me that he was very displeased about the fact that Mr. Collins had been given this case.

Q. And that he was unwilling to deal with him; isn't that a fact? A. I couldn't tell you whether he said that or not.

Q. Well, do you say that he didn't say it? A. No.

Q. All right, sir.

66 Now, did he tell you that by reason of previous experience which he had with Mr. Collins he did not

desire to deal with him and would not attempt to amicably adjust it if he was a part of the picture? A. No, he did not.

Q. Did he tell you words to that effect? A. No, I couldn't say that he did.

Q. Well, you were attempting at that time to settle the matter, weren't you? A. As I said before, where these things overlapped from three years ago, I don't recall exactly.

Q. But in your letter to Mr. Hartlove you indicated to him that you wanted Mr. Collins removed, did you not? A. No.

Q. You didn't? A. No, sir.

Q. Well, did you put it up to him to remove him? A. I just asked him to investigate the allegations made by Mr. Brown as to his character and I left it entirely up to him. In fact, I don't think—I haven't read the letter for three years—but I don't think there was any suggestion made that Mr. Collins be relieved from the case. I just asked Mr. Hartlove to investigate the remarks made
67 against his character.

Q. So from what Mr. Brown had said to you, you did not make any suggestions about removing Mr. Collins, you simply left it up to Mr. Hartlove to make an investigation? A. This is true.

Q. Now, you received an answer from Mr. Hartlove, did you, sir? A. Yes.

Q. And in that answer the suggestion was made that because of the fact that the question had been raised about Mr. Collins, that for that reason and not for any other, he was being asked to be removed? A. That letter advised me that Mr. Collins had been dismissed from the case. I'd have to read the letter to interpret it further.

Mr. Hayes: May I have the letter?

(Handing to witness.)

The Witness: Yes, he told me he was not in a position to investigate the allegations by Mr. Brown, so he was sending Mr. Collins notice of dismissal from the case.

By Mr. Hayes:

Q. Now, do you know as to whether or not Mr. Collins submitted a bill for the services he had rendered up
68 until that time? A. Not to my knowledge.

Q. Do you know whether or not he was paid for the services he rendered up to that time? A. He was not paid by my company.

Q. Are you certain of that, sir? A. I have no record of any bill being submitted or being paid by my company.

Q. All right, sir.

Now, you said Mr. Bonhach, that this was settled for a great deal less than was involved? A. Yes.

Q. Do you have a recollection as to what it was settled for? A. I recall it was in this Court, in fact, and I could be possibly wrong, but that would be by a few dollars, and I think our company attorney at that time settled for $18,000, less his fee, which the final result—I don't know the figure.

Q. And did those figures affect your fee? A. They certainly did.

Q. Does it refresh your recollection any, sir, if I
69 say to you that it was settled for $22,000? A. No.

Let me tell you why I make this statement. At the time the case was brought to trial in Washington, I had been transferred from the Baltimore office for quite a while and was in the New Jersey area, and I just came down for the trial, and I had nothing to do with that end of the business at this time, so I didn't see the final figures.

Q. But the reduction in the amount recovered did affect your commission? A. I already stated it did, yes.

Mr. Hayes: Would Your Honor indulge me for just a second?

The Court: Surely. Take whatever time you need.

(Pause.)

By Mr. Hayes:

Q. There is just one question I am not certain if I asked, if Your Honor please.

Did I ask you, sir, as to whether or not Mr. Brown said to you that Mr. Collins had a personal grudge against him? A. He did say that.

Q. He did say that? A. Yes.

Mr. Hayes: That is all I think I would ask.

70 Mr. Mack: I have no further questions of the witness, Your Honor.

May he be excused?

The Court: The witness may be excused.

* * * * * * * * * *

Henry Hartlove

was called as a witness on behalf of the Plaintiff, was duly sworn, and testified as follows:

Direct Examination

By Mr. Mack:

* * * * * * * * * *

71 Q. Do you know the plaintiff in this case, Dennis Collins? A. Yes, I do.

Q. And when did you first meet Mr. Collins, and in what capacity? A. Probably about 1960 for the first time. I had prepared a will in the State of Maryland for an old couple—

72 The Court: Well, you have answered the question.

The Witness: All right. Fine. Thank you, sir.

By Mr. Mack:

Q. Were you professionally associated with Mr. Collins in that matter? A. Yes, I was.

Q. Was that handled here in the District of Columbia? A. Yes, it was.

Q. Thereafter, did you have any further professional contact with Mr. Collins? A. I referred a few items to Mr. Collins that were handled here in the District.

The Court: I suggest you speak a little louder, or come closer to the microphone. Some of the jurors are quite a

distance away from where you are seated.

The Witness: Yes, Your Honor.

By Mr. Mack:

Q. You say you referred quite a few matters after that to Mr. Collins to be handled? A. Yes.

Q. In the District of Columbia? A. Yes.

Q. Would you call him your Washington cor-
73 respondent? A. Yes. Anything that would come up that I had in Washington I was referring to Mr. Collins.

Q. Did you in 1963 and 1964 have any relations with United Cork Companies? A. Yes. United Cork was giving me all the work that took place in and around Baltimore.

Q. In connection with your work for United Cork Companies, did you receive the file in connection with their claim for work done at 2142 to 2146 Queens Chapel Road in Washington? A. Yes, I did.

Q. And from whom did you receive that? A. This was received from Mr. George Bonhach, the Manager of the Baltimore District.

Q. And what if anything did you do with that particular case? A. I visited Washington at that time and came to Mr. Collins' office to ask his advice on it as to handling it here in Washington.

Q. Did you discuss the matter with him generally? A. Yes, I did.

Q. Thereafter, what happended? A. Well, there
74 was correspondence back and forth. Eventually, a lien was filed in the case by Mr. Collins.

The Court: Suppose you go a little slower. Will you repeat your answer?

The Witness: I say, there was correspondence back and forth between us, some telephone correspondence, some letters, and finally the case—a lien was filed in the case here in the District by Mr. Collins.

Mr. Mack: May I have Plaintiff's Exhibit 1, Your Honor?

By Mr. Mack:

Q. Mr. Hartlove, I show you what is marked Plaintiff's Exhibit No. 1, in evidence.

Do you recognize that letter? A. Yes, I do.

Q. And what is that letter?

The Court: It has been identified and admitted. It does not have to be identified a second time.

Mr. Mack: Very well.

The Witness: This was a letter—

By Mr. Mack:

Q. That's all right. You need not.

I show you another document not yet marked.

75 Can you tell us what that is, sir? A. In response to the letter which was previously admitted as Plaintiff's Exhibit 1, I have sent a letter to Mr. Collins telling him that his character had been brought into question and that—

Mr. Hayes: If Your Honor please, if this is a letter, I submit the letter is the best evidence.

The Court: The letter speaks for itself.

The Witness: All right.

The Court: You sent the letter that you are holding in your hand to Mr. Collins?

The Witness: Yes, sir.

Mr. Mack: May this be marked as the next Plaintiff's Exhibit for identification, Your Honor?

(Thereupon, letter was marked Plaintiff's Exhibit No. 3, for identification.)

The Court: Show it to Mr. Hayes.

Mr. Mack: I offer it in evidence, Your Honor.

Mr. Hayes: If Your Honor please, it has attached to it the letter which has previously been offered in evidence

and which Your Honor has admitted for certain limited purposes.

The Court: Yes.

76 Mr. Hayes: I submit if it goes in, then the attachment ought to go in, of course, under that same limitation or, in my opinion, it need not be offered again since that other letter is already in evidence.

The Court: Well, you do not want to have a copy of a prior exhibit offered again.

Mr. Hayes: That is what I was thinking.

Mr. Mack: So long as the jury understands that such a copy was sent to Mr. Collins, Your Honor.

Mr. Hayes: And that Your Honor has admitted it for certain limited purposes.

The Court: Under the circumstances, I think the copy should be admitted with the letter of transmittal.

Let it be admitted.

(Thereupon, Plaintiff's Exhibit No. 3, previously marked for identification, was received in evidence.)

The Court: You may read it to the jury, if you wish.

Mr. Mack: Thank you, Your Honor.

May it please Your Honor:

Ladies and gentlemen of the jury:

77 This is Plaintiff's Exhibit No. 3 in evidence, and it is on the stationery of Henry W. Hartlove, attorney at law, dated April 10, 1964, addressed to Dennis Collins, Esquire, Shoreham Building, Washington, D. C.

Dear Mr. Collins:

I send you a copy of a letter I received from United Cork Companies in which I was questioned as to your character and your ethics as an attorney. I have been asked to give an immediate answer regarding the allegations of Mr. Brown of the First National Realty Company which were contained in that letter.

Mr. Collins, in my dealings with you, I certainly could not believe that these statements are true, but I am not in the position to investigate them.

In order that I do not jeopardize myself with my client, I must ask that you withdraw from the case immediately. I have notified United Cork of your dismissal.

Very truly yours, Henry W. Hartlove.

And there is attached to it as an exhibit a copy of Plaintiff's Exhibit No. 1, the letter from Mr. Bonhach
78 to Mr. Hartlove, which was previously received in evidence and read to you.

By Mr. Mack:

Q. Mr. Hartlove, did you believe the things that were contained in the letter that Mr. Bonhach sent you in which he referred to the statements Mr. Brown had made about Mr. Collins? A. I had no reason to believe them because the dealings that I had had with Mr. Collins would never have led me to believe that he was the type of person described in the letter.

Q. In your dealings with Mr. Collins, had he ever discussed Mr. Brown with you? A. On the occasion where I came over with regard to the lien, yes. He told me that he had had a client that—

Mr. Hayes: If Your Honor please, he is—

The Court: Objection sustained. This is entirely irrelevant.

By Mr. Mack:

Q. Has Mr. Collins ever indicated to you his feelings toward Mr. Brown?

Mr. Hayes: If Your Honor please, I object again.

The Court: Objection sustained.

79 By Mr. Mack:

Q. Since you wrote that letter to Mr. Collins, I presume he replied and sent you the file, or made arrangements to deliver it, did he? A. Yes. He made arrangements to deliver it.

Q. And since that has happened, have you had any personal contact with him? A. None at all.

Q. Before that, were you a personal friend? A. No, I was never a personal friend.

Q. Have you told us your relation with Mr. Collins prior to that time? A. Yes.

Q. Have you sent him any business since you sent him this United Cork Companies case? A. No, I have not.

Q. Have you received any business from United Cork Companies? A. I have received none since then; no.

Mr. Hayes: If Your Honor pleases, I think that last question and answer should go out, whether or not Mr. Hartlove has received any business from United Cork Companies.

80 The Court: I did not get your objection.

Mr. Hayes: The question was whether or not Mr. Hartlove had received any business from United Cork, and I do not think this is admissible, if Your Honor pleases.

The Court: Just a moment.

Whether Mr. Collins received any business from Mr. Hartlove?

Mr. Hayes: No. The question was whether he, Mr. Hartlove, had received any business.

The Court: Whether Mr. Hartlove had received any business from Mr. Collins or from the United Cork Companies, which are you objecting to?

Mr. Hayes: The question was previously asked about Mr. Collins. I thought that might have some probative value.

But the question of whether or not he received any business from United Cork I do not think is relevant.

The Court: I sustain the objection. Whether this witness received business from United Cork Companies is immaterial and irrelevant.

Let that be stricken, and the jury will ignore the answer.

Mr. Mack: I have no further questions, Your Honor.

81 The Court: Is there any cross examination?
Mr. Hayes: Yes, Your Honor.

Cross Examination

By Mr. Hayes:

Q. Mr. Hartlove, was Mr. Collins paid for the work that he did for your company? A. Yes. We submitted a bill. Of course, the case was never completed by me or by Mr. Collins.

Q. I mean, did Mr. Collins, at the time when you severed his connections in this case, did he submit a bill to you for the services that he had rendered? A. Yes, he did.

Q. To that time? A. Yes, he did.

Q. And was he paid for those services? A. Yes, sir.

Q. In accordance with the bill submitted by him? A. Yes, sir.

Q. Now, from your communication, Mr. Hartlove, and from your answer to counsel, you have indicated that you asked Mr. Collins to disassociate himself in the case not because you believed what was said, but because you didn't have a chance to investigate it; is that correct, sir?

82 A. That's right, sir.

Q. Was there, Mr. Hartlove, any authorization in writing as to what Mr. Collins was supposed to do? A. Any authorization in writing?

Q. Yes. A. Not that I—

Q. When the case was submitted to him, was there anything that was written as to what he was to do at that time? A. No, sir; I don't think so.

Q. Was the filing of a mechanic's lien done at your suggestion or purely because of Mr. Collins' relationship and his work with United? A. Well, I come to work—in other words, United Cork Company asked me to look into the possibility of filing a mechanic's lien. I advised them that I was not an attorney here in Washington and couldn't do it, and asked them whether it would be all right for me to engage Mr. Collins, whom I had met.

Q. I see. A. At that time I came over to Washington to speak to Mr. Collins personally. I think you might say it was our joint decision to file the mechanic's lien.

83 Q. And did you know, sir, or did you have anything to do with the filing of it, as such? A. I wasn't here, no, sir. Mr. Collins filed it.

Q. So you had nothing to do with the naming of Mr. Brown on the mechanic's lien? A. No. I didn't know Mr. Brown. I have never met Mr. Brown.

Q. I see, sir. Thank you.

Was your arrangement with Mr. Collins a contingent arrangement? A. Yes, it was.

The Court: Mr. Mack?

Redirect Examination

By Mr. Mack:

Q. Do you happen to know the amount of the bill that Mr. Collins rendered? A. I don't recall.

Mr. Mack: No further questions, Your Honor.

Mr. Hayes: Would Your Honor indulge me just a second?

The Court: Anything further?

Mr. Hayes: No, Your Honor.

The Court: The witness may be excused. * * *

* * * * * * * * * * *

84 **Dennis Collins**

Plaintiff, called as a witness, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

* * * * * * * * * * *

85 Q. Mr. Collins, are you a member of the bar of this Court? A. Yes, I am.

Q. When were you admitted to practice in the District of Columbia? A. I think it was in the latter part of 1940.

I took the bar, Your Honor, in 1940, in June, and I was admitted in the usual course. I don't know the exact date.

Q. In what courts are you admitted to practice? A. Well, in this Court, the District Court, Court of Appeals, the Court of General Sessions, the District of Columbia Court, and I am also admitted to practice before several of the agencies, like the Treasury Department and Veterans Administration and so forth.

86 Q. Mr. Collins, when did you first have any contact with Sidney J. Brown? A. I believe it was sometime in the early part of 1954. It would have been in the early months, or possibly the latter part of 1953.

Q. Was this a professional contact? A. Yes.

Q. Who were you representing at that time? A. I was representing James R. Coates and his wife, Marianne Coates.

Q. In connection with your representation of them what action, if any, was there between the Coates and Mr. Brown? A. There was a suit filed by them for damages.

Q. Against whom? A. Against Sidney Brown and, I believe, also the First National Realty Corporation.

Q. What was the outcome of that case? A. It resulted in a judgment for the plaintiffs for $14,500.

Q. The plaintiffs in that case were whose clients? A. They were the clients of myself and my associate at that time, Harry A. Finney.

Q. And was that judgment ultimately paid? A. Yes, it was.

87 Q. Thereafter did you have any personal or professional contact with Mr. Brown, that is, after the judgment was paid in that case? A. So far as I can recall, I think there was one matter, a small matter involving a landlord and tenant suit or something of this sort for a man named—I think his name was Adams, Peter Adams, and that was the next time that I had any contact with Mr. Brown.

I mean, I say contact, I think it was against First National Realty Corporation or Mr. Brown, or both, and

that matter was terminated in a very short time. It was a rather minor matter.

Q. When were you first contacted about the United Cork Company claim? A. I believe it was in January or February of 1964.

Q. From the time that you had had your first contact with Mr. Brown in 1954 in the Coates case, up until the time that you had your next contact with him in the United Cork Company case, had you had any personal dealings with him of any sort? A. No. As far as I can recall, the only dealings I have ever had with Mr. Brown were matters involving some court action and as I recall, the only I had were those two cases.

88 Q. And would those be matters in which you were representing clients? A. Yes.

Q. Will you tell us what arrangement was made by you concerning your fee in the United Cork Company case? A. Well, when I—

The Court: No; the question is what arrangement was made concerning your fee.

By Mr. Mack:

Q. What type of fee? A. I had an understanding that my fee would be a maximum of 25 percent. I had indicated that it would be around 25 percent for handling the case.

Q. What would the precise percentage depend upon? A. Well, if—

The Court: Percentage of what, in other words?

The Witness: I beg your pardon?

The Court: 25 percent of what?

The Witness: Of what was recovered. I'm sorry, Your Honor. 25 percent of what was recovered.

Q. What legal action, what legal steps did you take in the case? A. When the file was turned over to

89 me I made an investigation to determine the ownership of the property in order to determine the proper manner of filing a lien, a mechanic's lien.

Q. And did you file a lien? A. I did.

Mr. Mack: May this be marked as the next plaintiff's exhibit for identification, Your Honor?

The Deputy Clerk: 4.

(Notice of lien marked Plaintiff's Exhibit No. 4 for identification.)

By Mr. Mack:

Q. Mr. Collins, I hand you what has been marked—

Mr. Hayes: May I see it?

The Court: No. Go ahead and ask your question.

Mr. Mack: Mr. Hayes asked to see it.

The Court: We can't interrupt that way. The document has not been offered in evidence.

Q. I hand you what has been marked as Plaintiff's Exhibit No. 4 for identification. Can you identify that, sir? A. Yes, sir.

Q. What is that document? A. That is a notice of lien which I filed on behalf of the United Cork Com-
90 panies against Sidney J. Brown and the First National Realty Corporation and the Regional Construction Company.

Mr. Mack: I offer it in evidence, Your Honor.

The Court: Now show it to Mr. Hayes.

(Pause.)

The Court: Were those documents produced at pretrial?

Mr. Mack: This is a court record, Your Honor.

The Court: Then you don't have to have a witness identify it if it is a court record. That is just a waste of time. Now let's move along, gentlemen.

Let it be admitted.

(Plaintiff's Exhibit No. 4 for identification was received in evidence.)

By Mr. Mack:

Q. Mr. Collins, I observe from the mechanic's lien that you named three parties as having an interest in the property, Sidney J. Brown, First National Realty, and Regional Construction Corporation.

Would you please explain very briefly why you named these three persons or the corporations and the person as parties on this lien? A. Yes, sir.

91 Q. Very briefly, please. A. I made an investigation—

The Court: Just tell us why you named those three parties.

The Witness: All right, Your Honor.

Your Honor, as a result of my investigation, I got information to indicate that these three parties were the real owners of this property.

By Mr. Mack:

Q. Now subsequent to filing that lien did you—that notice of lien, did you have any contact with any attorney representing Mr. Brown or First National Realty? A. Yes, sir; my recollection is that almost immediately after filing this notice of lien I received a call from attorney Paul Mannes, who stated that he was representing Mr. Brown and discussed the matter of possible settlement.

Q. And did Mr. Mannes make or convey any offer to you for you to convey to United Cork?

Mr. Hayes: If Your Honor please, this is objected to.

The Court: Objection sustained.

92 Q. What was the next thing that happened in the case of United Cork Companies? A. Well, after I made certain investigation, then I received a letter from Mr. Henry Hartlove indicating to me that he no longer wished me to represent United Cork Company in this suit.

Q. And what did you do then? A. I wrote to him and asked him what he wanted done with the—

Mr. Hayes: If Your Honor please, if this purports to be a written communication—

The Court: Objection sustained. If a letter is relevant and admissible, it speaks for itself.

Mr. Mack: Yes, Your Honor.

By Mr. Mack:

Q. What was done with the file in the case, Mr. Collins? A. The file was turned over to another attorney. I believe it was turned over to Slater Clarke. I am not positive if it was turned over first to somebody else, but it could have been Slater Clarke, it might have been Mr. Hartlove. I don't remember exactly how I disposed of the file, but it was turned over at their direction, anyway, at his direction.

Q. Did you render any bill for the services that you had performed up to the time of your discharge in the case? A. Yes, sir.

93 Q. And what was the amount of your bill? A. $150.

Q. And was that paid? A. Yes, sir.

Q. Did you receive any other compensation from either the attorney to whom the case was forwarded or United Cork when that case was finally terminated? A. No, sir.

Q. Have you ever received any other cases from Mr. Henry Hartlove? A. Prior to this—

Q. After this? A. After?

Q. Yes, sir. A. No, sir.

Q. Mr. Collins, will you tell us what effect, if any, your awareness of the alleged statements Mr. Brown made to Mr. Bonhach had upon you? A. Well, it was very mortifying to me and I felt that it reflected on my professional character and ability and it preyed on my mind for quite a while. For perhaps as long as a couple months after I would sometimes wake up in the middle of the night wondering what I had done wrong or if I had in

94 some way been derelict in handling the matter. It bothered me quite a bit.

Q. Had you ever been discharged by a client prior to that time? A. No, sir.

Q. What are your personal feelings toward Mr. Brown? A. I have no animosity towards Mr. Brown. What I have done—

The Court: Well, you have answered the question, Mr. Collins. You say you have no animosity.

The Witness: No, Your Honor.

The Court: Very well.

Mr. Mack: I have no further questions, Your Honor.

The Court: Any cross-examination?

Cross-Examination

By Mr. Hayes:

Q. Mr. Collins, were you employed for the purpose of filing the mechanic's lien? A. I would say yes. If I may explain, Your Honor.

The Court: You may explain your answer.

A. The case was sent to me for the purpose of doing whatever was appropriate in the circumstances.

Mr. Hartlove came to my office, as I recall, and
95 we discussed it. There was discussion of the fact that there was a time limit in filing the lien and we did discuss it. He brought up the matter, and I also was aware of the fact that there was a time limit on it from the time the last work was done. It's a certain number of days.

So the answer is that I was given the case to handle as was appropriate and proper, and in that regard filing a lien seemed to be the proper thing to do.

Q. Was the time for the filing of the lien approximately up at this time? A. I don't think it was—I think there may have been certainly several weeks further. I don't know the exact date, Mr. Hayes, but I know that there was a time limit. It did enter into my consideration of the matter and my discussion with Mr. Hartlove. I don't know the exact time now.

Q. Of course there is a provision as to a time limit. But my query is whether or not this time limit with which

we are all familiar, was that nearly expired so that you felt the requirement of filing the lien? A. My recollection is that there was some, perhaps, a couple of weeks or so left, but I know that I had—

The Court: Well, your answer is there was a couple of weeks left.

96 The Witness: I believe that is right, Your Honor, but that is my best estimate.

By Mr. Hayes:

Q. Did you attempt in any wise to negotiate the matter before the filing of the lien? A. No, sir.

Q. Now with respect to the lien you say that you made investigation and found out that the parties whom you named were interested in this property? A. Yes, sir.

Q. Were there people whose names appeared of record as the owners? A. No, sir.

Q. You say no? A. Maybe I didn't understand, sir. Would you mind repeating the question?

The Court: Suppose we have the question read.

(The Reporter read the question.)

A. Yes, sir, there were people whose—

Q. And with reference to the lien—May I have it, Mr. Clerk?

With reference to the lien, did it show Mr. Sidney
97 Brown as being a record owner? A. No, sir.

Q. Did it show the First National Realty Corporation as being a record owner? A. No, sir.

Q. Now this lien as filed is United Cork Companies against Sidney Brown and First National Realty Corporation as owners; that is right, isn't it, sir? A. That is right, sir.

Q. And you—

The Court: Well, there are others named in the lien.

Mr. Hayes: I am about to call his attention to it, if Your Honor please.

By Mr. Hayes:

Q. That is in the caption where it refers to owners.

Now you here say: Notice is hereby given that I intend to hold a mechanic's lien against the interests of Sidney J. Brown, First National Realty Corporation, a corporation, and Regional Construction Company, Inc., a corporation, in lots 1 and 2 in square 4259, improved by premises 2142, 2144 and 2146 Queens Chapel Road, Northeast.

Will you tell me, sir, as to what the record in the Recorder of Deeds Office showed as being the owners of these
98 properties? A. As I recall, the record showed that—

I think it's Louis Sandler or—I think Louis Sandler was one of the parties or it could have been a corporation in which Louis Sandler was an officer.

Q. Is that your testimony, that you found that the ownership was in Louis Sandler or some corporation in which Louis Sandler was an officer? A. I know that his name appeared somewhere, either in the records of the owner or in the records of the Recorder of Deeds, at the Corporation Section, because—well, I have reason to remember that.

Q. Well, I don't know that I am quite getting your answer. You found out that the property 2142, 2144 and 2146 Queens Chapel Road, Northeast, were in the names of this Mr. Louis Sandler? A. Sir, either in Mr. Louis Sandler or in the name of a corporation, some corporation which Mr. Sandler appeared as an officer of.

Q. Well, was either of the corporations which you here named, the First National Realty Corporation or the Regional Construction Company, are those the corporations to which you make reference? A. No, sir.

99 Q. So that the names of the persons whom you have in here did not appear as a matter of record at all in the Recorder of Deeds Office, is that right? A. That is right, sir.

Q. Is it a fact, sir, that the purpose of the mechanic's lien is to notify owners of record—

The Court: I think that is a question of law. The Court will pass upon that if it is important.

Mr. Hayes: All right, Your Honor.

By Mr. Hayes:

Q. Did you send notice to any of the persons whom you found to be the owners of record? A. You mean a notice of the lien, sir?

Q. Yes, sir. A. I don't believe I sent a notice of the lien. I notified them of the fact that I was placing a lien.

Q. Notified them how? A. By telephone. I was in contact with the record owners.

Q. So your answer is that you named other corporations, but notified the record owners by telephone? A. My recollection—that is my recollection, sir.

Q. What, sir, do you say you found that made
100 you—Will you tell us what you found that made you designate as owners Sidney J. Brown, First National Realty Corporation, and Regional Construction Company? A. Well, I ascertained the name of the tenant. I think it was the Rath Packing Company, and I made inquiry there as to who the landlord was and I was advised that the landlord was Sidney Brown and the First National Realty Corporation. I called their—I believe they have an office in Waterloo, Iowa, and I called out there and I ascertained this for a fact, that their record indicated—where they kept their lease records and so forth—that the First National Realty Corporation or Sidney Brown or one of his straw parties was the owner, and—

Q. Just a minute. You say that you called up—

The Court: Just a moment. Let him finish his answer.

Mr. Hayes: I'm sorry.

The Witness: Then I found out that this record owner, I think it's Dr. Louis Sandler, would appear, or some interest that he had in the corporation, I think it may have been Interurban or some other corporation, that I was able to identify by going to the Recorder of Deeds.

My office, my associate, Mr. Fitzgerald, made
101 investigation and as a result of that investigation we ascertained that that property had been sold by

what was now the record owner to, we were advised, Mr. Sidney Brown or First National Realty Corporation or somebody on his behalf, but we didn't know who the named nominee was.

If I may, Your Honor, I would like to—I think it might help to explain the fact that because of my previous dealings, representation in the case of Coates, I knew that Mr. Brown and the First National Realty Corporation and his sister, Esther Eden and several other corporations which he controlled, had been adjudged by this Court to be one and the same person. So when I knew that Mr. Brown was receiving the—when I was advised that a deed had been made conveying the interest to him or to his designee—

Mr. Hayes: If Your Honor please, Your Honor has admonished me to allow him to finish his answer, but apparently—

The Court: You asked him a question which cannot be answered yes or no. You asked him for his reasons for naming these parties in the lien, and of course he has a right to make an explanation.

Mr. Hayes: The only thing that I am saying, if Your Honor please, I don't believe that under these cir-
102 cumstances it is a question of people who have said things to him, and various things which would be purely hearsay—

The Court: Your question is broad enough to call for hearsay. You asked him to explain why he named these concerns who don't seem to be owners of record in the notice of lien. He is trying to give you an explanation. Now some people are more succinct than others. He is giving you a detailed explanation.

You may finish your explanation. Have you finished it?

The Witness: I think I have. I forgot what else I was going to say, so I think I have finished.

* * * * * * * * * * *

105 By Mr. Hayes:

Q. Mr. Collins, I believe on yesterday you indicated to your counsel that you are engaged in the general practice of law; that is correct, is it, sir? A. Yes, sir.

Q. And have you specialized in any field? A. Well, I have done quite a bit of general trial work. I have tried a good deal of personal injury suits, I have done quite a bit of administration of estates, and I have done quite a bit of work in the field of mechanic's liens and so forth.

Q. So that in this area of mechanic's liens you
106 have had considerable experience? A. Yes, sir.

Q. How many cases would you say? A. Well, I would be estimating, sir, but I would say at least maybe 75 to 100, possibly over the last 25 years.

Q. Now when this file was turned over to you did you make any attempt to find out who the record owner of the property was? A. Yes, sir, I did.

Q. And will you tell us what that experience was, where you went and what you found? A. I first went to the Recorder of Deeds and I could not find the specific, one of the specific addresses which I had there; so I went from there to the office where they keep the plat books and I conferred at that office with them.

I eventually found out that one of the addresses which I had was a sort of an arbitrary address number, which is what caused some confusion.

And also in connection with checking this title I believe that I checked at the Office of Corporations, Superintendent, in order to check their records.

Q. Did you find the owner of lots 1 and 2, square
107 4259, that you listed on your lien? A. I believe I did, sir. I am sure that I found who was then the current—who was then the record owner at that time.

Q. And may I ask you whom did you find to be the record owner? A. I believe—I have looked at some notes which I made at the time—I believe it was parties by the name, I think, of Kaplan.

Q. And did you notify the record owner of the filing of the lien? A. I did. Whoever the record owner was, and

I think it was Kaplan, they were notified, because we discussed with them the fact that we had this lien, or that we had this claim and so forth and inquired if they were the actual owners and I found out that they were not.

Q. On yesterday I think you said, and correct me if I am wrong, that you found the record owners to be a man named Sandler and some other corporation or company? A. I believe that I would have been incorrect in that. I think Sandler, if I recall, had been the previous owner who had conveyed it to Kaplan.

Q. Now that is my question. Did you find out that Sandler was a previous owner and had conveyed to
108 Kaplan? A. I am reasonably sure that I did.

Q. And are you also reasonably sure that your statement which I think you made on yesterday that you contacted Sandler, whom you had found to be the record owner, do you say now that you did not contact him but contacted Mr. Kaplan? A. I think I contacted both.

There was a great deal of confusion concerning this title, which is the reason why I went down to the plat book to try to ascertain the actual condition of it from the man in charge there, from the head Superintendent, and I know there was a lot of confusion in the record because of this arbitrary numbering.

So I am sure that I was in touch probably with both Kaplan and the Sandlers.

Q. And did you notify these people in writing? A. No, sir.

Q. You notified neither of the owners in writing? A. No, sir.

Q. With respect to the company which you said that you found owned one of the properties, is that a fact, that you found some company to own one of the properties? A. Well, at this time I remember there was some question—
and how this came in I can't say with any degree
109 of certainty—I know that there was Valley Forge Distributing Company, I think, at one time appeared in the record in some way connected with it. Then I think

Rath Packing Company. That, I think, was the tenant.

So I don't know the exact relation of these various people, what the records indicate at this time, because I have not reviewed it in any great detail.

Q. But you do know, if I understand you correctly, that with respect to neither record owner whom you found, did you send him a written notice that a lien was filed? A. That is correct.

Q. And are you equally certain that you did notify both Mr. Kaplan and Mr. Sandler by verbal conversation with them? A. I know that my associate, Mr. Fitzgerald, did some research on this matter concerning the preparation of the lien and so forth, and I am sure the Kaplans were notified as to exactly what we were in the process of doing, and they submitted information which enabled us to file the lien which was subsequently filed.

Q. Do you mean from the owner you got the information as to how to file the lien? A. No, sir.

110 Q. I'm sorry, I misunderstood you. A. From the Kaplans, from the last persons who we were advised had conveyed their interest in the property to Sidney Brown or one of his nominess, one of his straw parties, this information came.

Q. And that information came from Mr. Kaplan, you say? A. I am reasonably certain that it was Mr. Kaplan. It was my associate, Mr. Fitzgerald, who investigated this phase of the matter.

Q. Did you go to the Lusk Book in making your inquiries? A. Yes.

Q. And what did that Lusk Book disclose to you, sir? A. I have no distinct recollection as to what the Lusk Book disclosed, but what recollection I have is that the Sandlers appeared, I believe, at that time to be the record owners.

Q. And was that a book which was current at the time when this proposition was turned over to you? A. I went to the latest source available in the Lusk Book, yes, sir.

Q. And are you saying, then, sir, that the Lusk Book

showed Sandler or Kaplan? Which do you say, sir?
111 A. Well, let me say this: I have no distinct recollection as to what the Lusk Book showed, but I know that I checked all available sources of information as to who actual owner was and my recollection is that it was Kaplan, the Kaplans who at that time were the owners.

Q. Is it your practice, Mr. Collins, in notifying the owner of the property, to simply do it verbally? A. I'm sorry?

Q. Is it your practice in notifying the owner of the property, the record owner of the property, to simply do it verbally? A. Well, actually, no, sir, it isn't my practice. Actually, what I was doing here was trying to find out who the actual owner was, as distinguished from what the record showed. I had information that there had been a deed which had conveyed the interest of who appeared to be the record owner to Sidney Brown or to one of his straws and I was interested in going after the person who was the actual owner.

Q. In other words, you were finding out whom in your opinion the equitable owner was, and having found out whom the equitable owner was, you did not see fit to notify the record owner? A. The record owner was aware
112 that I was contemplating filing the lien, but the record owner had no actual interest in the property at that time.

Q. And that is my question, sir. Finding that, you did not see fit to notify or to have the lien run against the record owner? A. No, sir.

Q. Couldn't the record owner have conveyed the property and so have defeated your purpose? A. Well, that—

The Court: I think that is an argumentative question. I think it is irrelevant.

By Mr. Hayes:

Q. In attempting to find out about the record owner did you go to the contract that was had between your client

and the Regional Construction Company? A. I do not have the file and I haven't had it for a couple of years, but my recollection is that I had a copy of the contract between the Regional Construction Company and United Cork, yes, sir.

Q. Did you use that as a means of finding out as to whether or not these names appeared as owners of the property? A. Yes, I did.

Q. Well, didn't the contract that you had show
113 that United Cork was a subcontractor? A. I don't remember whether United Cork was a subcontractor or not. I don't remember just who the contract was with. I know the other party we have just mentioned—

Q. Regional Construction? A. Regional Construction, or there was another name in there which I can't recall, but I think it was Regional Construction, I know that that was one of the parties and I had the copies of the contract available.

Q. United Cork was your client, sir. Are you saying that you didn't know that they were simply subcontractors? A. I am not saying that. I am saying I do not remember at this stage. I haven't seen this contract for two years and I don't remember just whether they were general contractors or subcontractors.

Q. You would not have expected, would you, to have found the name of the property owner in the contract between the original contractor and the subcontractor? A. I am not sure that I understand your question.

Q. Well, let me call your attention to testimony given by you—I am referring to the deposition of Mr. Collins taken on the 4th of November, on page 5 of this record—
in this you said, sir, you had said you had checked
114 the record, and the question was asked:

"Checked what records? "A. The land records"—

The Court: What are you reading from?

Mr. Hayes: From the deposition of Mr. Collins, if Your Honor please, dated November 4, 1964, page 5.

The Court: It doesn't seem to be there. Who took the deposition, was it taken in behalf of the defendant?

Mr. Hayes: Yes, Your Honor. I will be glad to hand up my copy. Mr. Mack will let me use his.

The Court: It may be that the original was not filed.

Mr. Mack: I have a copy, if the Court will use mine.

The Court: Very well.

By Mr. Hayes:

Q. Reading from page 5, Mr. Collins:

"Q. Will you tell us specifically what you did from the time you got the file that Hartlove sent over?

"Well, I looked at, I believe, copies and maybe some original of contracts in the file. There was some contract between United Cork and the parties"—

115 The Court: Some correspondence. You misread that, didn't you?

Mr. Hayes: I'm sorry.

Q. "There was some correspondence between United Cork and the parties and I check the records to see in whose name the property was.

"Checked what records?

"The land records.

"What land records, specifically? Will you tell us what records?

"The land records of the District of Columbia.

"You mean you went in the Recorder of Deeds Office?

"Yes.

"What did you find there?

"I couldn't find that the property on which the work had been done was recorded in the names which appeared in the contract."

Now my question is, sir, with your party as a subcontractor—

The Court: You have no right to read from the deposition unless you are going to question the witness about it,

unless there is some contradiction between the depo-
116 sition and the testimony on the stand.

Mr. Hayes: I am, if Your Honor please, going to question him about—

The Court: You have a right to ask him whether he said this.

By Mr. Hayes:

Q. Did you say that, sir? A. Yes, sir.

Q. And were you at that time mindful that your party was a subcontractor?

The Court: I think we are spending a lot of time on things that are absolutely irrelevant. What difference does it make whether Mr. Collins' client was the principal contractor or prime contractor or a subcontractor? What difference does it make so far as this case is concerned?

Mr. Hayes: Well, if Your Honor please, it is one of the positions, as Your Honor may know, of the defendant and the testimony has been given as to a conversation had between Mr. Bonhach and the defendant in which he said that Mr. Collins, in his opinion, because of his relationship with him, was not interested in what the actual recovery—

The Court: I remember the testimony. My question to you is how is it relevant as to whether Mr. Collins'
117 client was the prime contractor or a subcontractor?

Mr. Hayes: It would tend, in our opinion, if Your Honor please, to show one of two things: One, that Mr. Collins did not concern himself actually about who the parties were and whom to name once that he found that Mr. Brown—

The Court: And what is the other? You said there were two purposes in this line of inquiry.

Mr. Hayes: The other one was as to whether or not he filed a lien once he found that Mr. Brown's name appeared in any connection with it, without going forward with properly protecting as far as the lien was concerned.

The Court: You have a right to inquire into this, but I think you have about exhausted the subject. He says he doesn't remember now, because he hasn't had the file for two years, as to whether his client was a subcontractor or prime contractor. You have gotten your answer.

Mr. Hayes: Well, I hadn't gotten it, if Your Honor please, until that time.

The Court: Well, that is what he practically said. I think we better move along.

Mr. Hayes: May I, if Your Honor please, call attention to page 11.

The Court: You may proceed.

118 By Mr. Hayes:

Q. "To whom and from whom and dated when?"

This refers to a letter which had been written, from which Mr. Collins had been testifying.

"To Henry Hartlove.

"From you?

"Yes.

"Dated when?

"February 17th, 1964, I found out the property at 2142 Queens Chapel Road was in the name of I Louis Chandler and the property at 2146 was in the name of the Valley Forge Distributing Company."

Now did you answer the question in that way, sir? A. Yes, I did.

Q. Well, is it a fact that at the time the record showed the property to be in the name of Hyman Kaplan? A. I had originally—my original search had indicated that the property was in the name of Kaplan and then upon a re-check of the matter, I believe that I found out that the property then was in the name of Kaplan.

Q. Well, this deposition, Mr. Collins, was taken on the 4th of November 1964. You mean you rechecked
119 after the time of the taking of this deposition? A. No. In my notes which I made I found out, I think

it was, if I recall correctly, about July of '62 the Kaplans had acquired title to this property.

Q. Well, was that after the time that the Sandlers had acquired title to it? A. My recollection is yes, sir.

Q. Well, then this statement that you made in this deposition was not correct? A. My deposition, I believe, was referring to a letter I had written to Mr. Hartlove in which, if I recall, I had stated what the record showed, and it was after that that I determined that the title was not as I had stated in the letter to Mr. Hartlove.

Q. All right, sir. In filing the mechanic's lien was it your purpose to establish a security interest in the real property for your client? A. Yes, sir.

Q. And did you conclude that this could be accomplished without naming the record owner of the property? A. Yes, sir, I felt that if I filed the notice of lien against the real parties in interest, that that would protect my client.

120 Q. All right, sir. Do you know whether or not after the time you were engaged that Mr. Bonhach or people representing United Cork continued to negotiate for the settlement of the matter with Mr. Brown? A. I had no knowledge as to what transpired after the case, the file was turned over by me to whomsoever United Cork directed me to turn it to or Mr. Henry Hartlove. I understood at a later date that the case was settled, but I didn't know the details.

Q. No, I think you misunderstand, perhaps, my question. After the time that the matter was turned over to you—and I think that you testified it was turned over to you to collect the money, not simply to file a lien, is that right?

The Court: Well, he has already testified to that. Let's not have repetition. Let's move along a little faster.

Mr. Hayes: All right, sir.

I'm sorry, Your Honor, the interruption took the thought from me.

By Mr. Hayes:

Q. You were employed to file a mechanic's lien. My question is, did you know that the attempt to settle the matter and to collect the matter was continued after
121 the time that you were employed for the filing of the mechanic's lien by people representing your client, Mr. Bonhach, who had turned the matter over? A. Might I say, sir, do you mean while I was handling the case?

Q. Yes, sir. A. I had no such knowledge of that. I assumed that I was handling the whole matter at that time.

Q. And you didn't attempt to settle the matter, you simply filed a lien? You didn't get in touch with Mr. Brown about it at all, is that a fact? A. No, sir.

Q. And you did not know that the people whom you represented were themselves getting in touch with him, is that your answer? A. I had no knowledge as to what anybody else did in the case. I thought I was handling the whole matter at that time.

Q. I hand you this and ask you if you will look in it and tell me whether or not those are your income tax returns for what years? A. Yes, sir, I have my income tax returns here, as I was requested to bring for the years
122 1962, '63, '64 and '65. I do not have as yet prepared my 1966 return, Your Honor.

The Court: You only have about a week.

Mr. Hayes: If Your Honor please, may I have the opportunity of looking at these? I have not had a chance to see them as yet.

(Pause.)

The Court: Gentlemen, if you want to take time to examine papers wouldn't it be better to do it during the noon recess and go on to something else in the meantime so we wouldn't take time unnecessarily?

Mr. Hayes: Yes, sir. I will forego asking that, if Your Honor please.

By Mr. Hayes:

Q. Mr. Collins, at the Recorder of Deeds Office did you check the lot and square index? A. Yes, sir.

Q. And did that show the owner by lot and square? A. Well, perhaps I can answer this way: I had addresses and I was trying to tie up the addresses with lots and square and I could not. I think there were three numbers, 2142 and '44 and '46 and I could not identify these in the records at the Recorder of Deeds Office, and it's after I looked at all available records there, I then went
123 down to the District Building where they keep the plats.

So I had considerable difficulty and I found out later on that, as I said, these addresses, one of them was an arbitrary address.

I found out whatever, I think, was available, although I think perhaps at that time, as I have indicated, I may have missed the name of the latest owner, but I did subsequently find it, Kaplan.

Q. As far as the lot and square was concerned, did you find the lot and square of the property that you were interested in, upon which the work had been done, to be lots 1 and 2 in the manner in which you put them on your lien? A. As far as I know, sir, that is the way I found it.

Q. Did you check the grantor and grantee indexes? A. I did, sir. That was part of my checking at the Recorder of Deeds.

Q. Didn't that show that the grantor was, as far as this property was concerned, was Sandler, and Mr. Kaplan was the grantee? A. That I did find. As I have indicated, I did find that, but when I found it in the sequence of events I don't remember, but I did find it, yes.

Mr. Hayes: Will Your Honor indulge me just a
124 second? (Pause.)

I think that is all I want to ask.

If Your Honor will allow us after the time of the recess period, after I have had a chance to look at these, to determine whether or not I want to ask any questions with respect to them.

The Court: Very well.

Mr. Mack: Your Honor, I have a few questions I overlooked on direct examination and I ask the Court's permission to open the direct for a very—

The Court: I will let you do that, although I must say I always dislike to do it because that reopens the cross-examination as well. I always urge counsel to exhaust their direct examination before they close it. However, if you consider it important you may do so.

Mr. Mack: I do, and I apologize to the Court.

Redirect Examination

By Mr. Mack:

Q. Mr. Collins, are you anti-Semitic? A. No, sir.

Q. Do you practice bigotry? A. No, sir.

Q. Did you file this mechanic's lien naming Sid-
125 ney Brown and First National Realty because you have a personal grudge against Sidney Brown? A. Absolutely not, sir.

Q. Did you obtain a fraudulent judgment in the approximate amount of $14,000 in favor of your clients, the Coates, against Mr. Brown? A. I certainly did not, sir.

The Court: May I call counsel's attention to the fact that the law does not require a plaintiff in an action for defamation to deny the defamatory words. Truth is an affirmative defense and the burden of proof is on the defendant to establish proof if he desires to try to do so. However, these questions are perfectly proper even though they are entirely unnecessary.

By Mr. Mack:

Q. Mr. Collins, on cross-examination Mr. Hayes asked you—

The Court: Are we on redirect now? Is this redirect now?

Mr. Mack: No, Your Honor—yes, pardon me, redirect. I have covered the matters that I forgot to ask before.

The Court: Yes. Now we are on redirect examination?

126 Mr. Mack: Yes, Your Honor.

The Court: Very well.

By Mr. Mack:

Q. On cross-examination Mr. Hayes asked you whether you had notified what he called the record owners of the property concerning your notice of lien, and you said you had not, is that correct? A. That is right. That is my recollection.

Q. Did you give any notice of any kind in this case to any persons concerning filing of the lien? A. Yes, sir; my recollection is that I gave notice to the persons named in the lien, to Sidney Brown, First National Realty, and this—

Q. The construction company? A. Beltway. I have trouble with the name. I think it was Beltway.

Mr. Mack: May this be marked with the plaintiff's next number for identification, Your Honor.

The Deputy Clerk: 5.

(Copy of letter dated 2-12-64 from Mr. Collins marked Plaintiff's Exhibit No. 5 for identification.)

By Mr. Mack:

Q. Mr. Collins, I show you what's been marked Plaintiff's Exhibit No. 5 for identification. Can you tell
127 us what that is? A. Yes, sir; this is a copy of the notice which I sent to Mr. Brown, First National Realty Corporation, and Regional Construction Company.

Q. And what are those little slips attached to the sheet of paper? A. These are the return receipts. It was sent

by registered mail and this is at least one copy of the receipt. Whether there were any more, I don't remember.

Q. And the addresses for all of those persons is the same, is it not? A. Yes, sir.

Q. And does the receipt show that the letter was received? A. There is a receipt from First National Realty and it looks like B-C-A-U-L-L.

Q. What is the date of the letter? A. February 12, 1964.

Q. Was it actually mailed that day? A. I would have no recollection except for the fact that it is stamped, the Post Office mark is stamped February 13.

128 Q. The following day, of course. A. That is what it appears.

Mr. Mack: I offer this in evidence, Your Honor.

The Court: Show it to Mr. Hayes, please.

(Pause.)

Mr. Hayes: I have no objection to it, if Your Honor please.

The Court: Let it be admitted.

(Plaintiff's Exhibit No. 5 for identification was received in evidence.)

By Mr. Mack:

Q. Now on cross-examination Mr. Hayes was asking you the source of the information, your information that the property had actually been conveyed to First National Realty. Do you recall that? A. Yes, sir.

Q. And I believe you testified that Mr. Fitzgerald, your associate, obtained that information? A. Yes, sir.

Q. Do you happen to remember how he knew this person who gave—

Mr. Hayes: If Your Honor please—

The Court: Objection sustained.

Mr. Mack: That is all I have, Your Honor.

129 Recross-Examination

By Mr. Hayes:

Q. Mr. Collins, you have shown to the Court a copy of a written communication with a registered receipt sent to the three people whom you named as the equitable owners in the lien. You didn't make any such communication to the record owners, did you, sir? A. No, sir.

Q. All right, sir. You said, sir, that you did not file a fraudulent suit. Did you, sir, file a suit representing clients in which you charged or in which Mr. Brown was charged with fraud? A. Yes, sir.

Mr. Hayes: All right, sir.

That is all I have.

* * * * * * * * * *

130 **Sidney J. Brown**

Defendant, called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

* * * * * * * * * *

133 Q. Now on March 25, 1964 either you or Mr. Zeiba at your direction—Mr. Zeiba is an employee, is he not? A. He was vice-president of the Regional Construction Company.

Q. Either you or Mr. Zeiba, at your direction, placed a telephone call to Mr. George Bonhach in Baltimore, Maryland from 629 F Street, Northwest? A. That is correct.

Q. Mr. Zeiba listened to that telephone conversation, did he not? A. Yes.

Q. In that telephone conversation you mentioned the name of Dennis Collins, didn't you? A. Yes, I did.

Q. And you told Mr. Bonhach that Dennis Collins was not concerned about the money he was to recover as a fee

in the mechanic's lien case, but he had filed the case because he had a personal grudge against you? A. Generally I said that.

Q. And you mentioned a $14,000 judgment, did you not? A. Yes, I did.

Q. You were referring to the Coates judgment,
134 weren't you? A. Yes, I was.

Q. And you used the word fraudulent during that telephone converstion, didn't you? A. My recollection is I referred to a suit for fraud.

Q. No, sir. The question is, did you use the word fraudulent during that telephone conversation? A. I may have in referring to the type of suit, a suit for fraud.

Q. Well, Mr. Brown, you are an attorney, are you not? A. Yes, sir.

Q. And you know that there is a big difference between the words a suit for fraud and a fraudulent suit, don't you? A. Yes, there is, if you think about it.

Q. Is it your testimony now that you did use the word fraudulent during your conversation with Mr. Bonhach? A. If I did—and it's possible that I did in the heated conversation. Sometimes you use a word, you want to say a suit for fraud was brought and you might say a fraudulent suit was brought.

Q. What do you mean by a fraudulent suit? A. A fraudulent suit, when I think about it, is one not based upon the facts but based upon made up representations.
135 Q. Now in your conversation with Mr. Bonhach were you excited? A. Well, let's say I wasn't calm. I probably was upset.

Q. Were you excited? A. I may have been.

Q. Well, now, do you recall when your deposition was taken on March 15, 1965, at page 51 of your deposition were you asked this question and did you make this answer:

"Q. Were you excited during your conversation with Mr. Bonhach on March 25?

"A. No."

Did you make that answer to that question? A. If that is what you are reading, that is the answer I gave.

Q. Now the reason you used the word fraudulent in connection with the suit that Coates filed against you is because you felt that Dennis Collins knew that this was a fraudulent suit, is that not correct?

Mr. Hayes: If Your Honor please, I think that the question is improper. The question assumes something which I don't think he testified to.

The Court: Just a moment. Are you objecting?

136 Mr. Hayes: Yes, Your Honor.

The Court: On what ground? I always like to have objections stated in legalistic phraseology without discussing the facts.

Mr. Hayes: Yes, Your Honor. I am objecting on the ground that the question included a premise which I do not think is a part of the testimony. He based it on theory—

The Court: This witness is an adverse witness and therefore is subject to cross-examination.

I will overrule the objection.

Would you like to have the question read?

The Witness: Would you, please, sir?

(The Reporter read the last question as follows: "Now the reason you used the word fraudulent in connection with the suit that the Coates filed against you is because you felt that Dennis Collins knew that this was a fraudulent suit, is that not correct?")

The Witness: I may have felt that way.

By Mr. Mack:

Q. Well, you still feel that way, don't you, sir? A. I felt the suit was unjustified.

Q. No. You still feel that Dennis Collins know-

137 ingly filed a law suit against you in which he knew it was fraudulent. A. This is my belief.

Q. Have you ever read the Court of Appeals opinion in your case? A. Yes, I did.

Q. Yes, sir. Tell us what happened to the case on appeal, Mr. Brown.

Mr. Hayes: I object, if Your Honor please.

The Court: Objection sustained. The record speaks for itself.

Do you have the citation?

Mr. Mack: Yes, I have the case here, Your Honor. May I pass it to the Court? It's marked.

By Mr. Mack:

Q. Now, Mr. Brown, did you attend the deposition of Mr. Bonhach, by any chance? A. I don't believe so.

Q. You knew it was to be taken, didn't you? A. I may not have known.

Q. Do you deny knowing it was taken? A. I don't know, sir.

Q. Well, do you recall talking to him the week be-
138 fore his deposition was taken on August 20, 1964?
A. I may have.

Q. Why did you want to meet with him without his company knowing? A. I don't understand the question.

Q. Why did you want to meet with him without his company attorney knowing about the meeting? A. Are you asking me if I wanted to meet with him without his company knowing?

Q. Yes. A. You are assuming something, I think.

Q. Yes, I am, sir. A. Well, the answer is, I did not say or ever indicate that I wanted to meet with him without his company knowing.

Q. Did you tell him you were going to Baltimore on your way for dinner and wanted to talk to him? A. My recollection is I said that to him.

Q. And did you offer to let him pick up the check for the full amount of the claim? A. I don't recollect anything like that.

Q. Did you say that your company wouldn't be adverse to pick up a check for the full amount of the claim? A. I don't remember any such statement.

Q. You just don't know whether it happened? A.
139 I don't remember any such statement.

Q. And then did you ask him to come over to your office later that week, still before the deposition? A. I don't recollect that I did.

Q. And did you ask him if he could meet with you and not let anybody know that you'd meet away from the office? A. I never made any such request.

Q. Why did you want to meet with him about this time? A. We were trying to settle the indebtedness at that time.

Q. Did it have anything to do with the fact that his deposition was to be taken in this case? A. I would say absolutely not because we owed the money and we had to pay it. We were being sued for it.

Q. You didn't pay it all eventually, did you? A. We were being sued for it.

Q. You didn't pay it all, though, did you? A. I think we paid what we thought we owed.

Q. Well, you as an attorney know what a deposition is, do you not? A. Yes, I do.

Q. And you know that it's the first time that a proceeding of a formal nature is made in a case, in which
140 the witness is sworn and gives testimony which is preserved in the law suit, don't you? A. Well, yes, this is correct.

Q. And you know that from that, at trial, if the witness changes his testimony, you are able to go back to the deposition and point out inconsistencies—

The Court: I don't think you should examine him on law. This is not a bar examination.

By Mr. Mack:

Q. And it's your testimony that these two telephone calls the week before the deposition were strictly involving

your attempt to settle the law suit, is that correct? A. You are still assuming some things which I don't think I testified to.

I have some recollection of talking to him. I don't know whether there were two phone calls or whether there was one phone call. As a matter of fact, my recollection is it was one. He made it to me.

Q. There came a time when Mr. Bonhach came to your office and told you that Dennis Collins had been fired from the case, is that not correct? A. I remember him visiting me, yes.

Q. And that made you happy, didn't it? A. Well,
141 I felt that there is a possibility for working out a settlement.

Q. That made you happy, didn't it? A. I don't know whether I was happy. I just felt that I could settle the case.

Q. Well, you weren't unhappy about it, were you? A. No, I was not unhappy.

* * * * * * * * * *

Q. And did you respond, when Mr. Bonhach told you that, that's fine? A. I may have said that, yes.

Q. Then you asked Mr. Bonhach for a copy of the letter that he wrote to Mr. Hartlove, didn't you? A. Yes, I did.

Q. And when you didn't get it, settlement negotiations in the United Cork case came to a halt, didn't they? A. I don't understand.

Q. I say when you did not receive a copy of Mr. Bonhach's letter to Mr. Hartlove concerning that telephone conversation you stopped settlement negotiations at that point? A. Not because of the fact that he didn't
142 give me the letter, sir.

Q. Was it just a coincidence that it stopped at that time? A. There was no coincidence. We just were negotiating right along and talking. It never stopped, sir.

Q. Have you produced the documents that this Court

has ordered you to produce at this trial? A. I believe I have the things that I was able to obtain.

Mr. Mack: May I examine those over the lunch hour, if Your Honor please? I have not concluded yet. I just wanted to see if he had them.

The Court: Yes.

By Mr. Mack:

Q. You hate Dennis Collins' guts, don't you? A. I think this is a statement—

The Court: I wouldn't use words like that.

Q. Well, let me withdraw that.

You hate Dennis Collins, don't you? A. I don't like him, let's put it that way.

Q. To what extent does your dislike extend, Mr. Brown? A. To the extent that I would rather not do business with him.

143 Q. Do you recall testifying on your deposition on page 21 as follows—perhaps I should begin on page 20 to get the context of it, the last question on page 20:

"When you say that you told Mr. Bonhach that Dennis Collins saw red in relationship to you, what did you mean by that?

"A. It is an expression. Got excited. Wanted to jump on my back.

"Q. What was the basis for saying that?

"A. Because every time I saw him I thought he would take out a gun and shoot me. He just looked so mean at me all the time I figured he hated my guts. I assure you I didn't like him either.

"Q. Did you hate his guts?

"A. I guess you could put it that way."

Did you make those answers to those questions? A. Those are the statements that you made and I answered.

Q. Now actually the only contact between you and Dennis Collins of any substantial nature has been in con-

nection with law suits, has it not? A. You say law suits.

144 Q. Yes. A. I am thinking of one suit.

Q. Well, at any rate you have no— A. Other than this one.

Q. You have no personal contact with him? A. None at all.

Q. Have you ever talked to him personally outside of the court? A. Have I talked with him?

Q. Yes. A. I don't recollect ever talking with him.

Q. In other words, everytime he's talked to you or you have talked to him there has been a reporter, just like we have here, transcribing what's been said and done? A. That is pretty much the case.

Q. Now this was not the first time that you tried to get even with Dennis Collins for getting that Coates judgment against you, is it?

Mr. Hayes: If Your Honor please, I object to that.

The Court: I think this is permissible cross-examination, Mr. Hayes.

Mr. Hayes: I was calling attention to the characterization "getting even".

The Court: When a party calls an adverse wit-

145 ness he may ask questions on cross-examination.

Mr. Hayes: I am calling attention to the characterization of "getting even" without showing any testimony of getting even. He used the expression "was this another way of getting even." and I don't think there is any testimony—

The Court: I think that is permissible cross-examination. That is a choice of words that counsel has a right to make.

By Mr. Mack:

Q. Do you recall the question, sir? A. No, sir.

The Court: Let the Reporter read the question.

(The Reporter read the question as follows: "Now this

was not the first time that you tried to get even with Dennis Collins for getting that Coates judgment against you, is it?")

A. I don't know what time you are referring to, this is not the first time.

Q. I am speaking of your conversation with Mr. Bonhach. A. The question assumes that I was trying to get even with somebody and I can't answer it fairly.

Q. Well, have you ever tried to hurt Dennis Collins or endeavor—

146 The Court: I think we will suspend at this time for our luncheon recess.

I think your question must not assume facts, Mr. Mack, they should be questions.

Mr. Mack: Very well, Your Honor.

(At 12:30 p.m. trial stood in recess, to reconvene 1:45 p.m.)

AFTERNOON SESSION

The Court: I want to inform counsel that a new Judge of the Court of General Sessions, Judge Korman, is going to be sworn in this afternoon and I want to attend the ceremony and because of that we will recess for the day at 3 o'clock.

You may proceed.

Mr. Mack: Your Honor, may Mr. Collins be excused to pick up a file from the Clerk's Office that is relevant to this proceeding?

The Court: Yes. A party doesn't have to be present throughout the trial.

By Mr. Mack:

Q. Mr. Brown, do you know a person by the name

147 of Hugh Duffy?

(Pause.)

Q. He is a process server, private process server in the District of Columbia and he has offices at 412 Fifth Street, Northwest. A. I don't believe so.

Q. Is it not a fact, sir, that you have called Mr. Duffy and asked him to make an investigation for you of Dennis Collins? A. No, sir.

Q. You deny that? A. I do, sir.

Q. You have written to the Bar Association about Mr. Collins, have you not? A. I recollect writing to them about him.

Q. And didn't you suggest that he should not be permitted to act as an attorney?

Mr. Hayes: If Your Honor please, I want to object to this.

The Court: Will counsel come to the bench, please.

(At the Bench:)

The Court: What is the basis of your objection?

Mr. Hayes: There is no claim of any slander or
148 libel or anything of that kind as far as this is concerned.

The Court: This goes to the question of damages and the proof of actual malice. That is why I will admit it.

(In Open Court:)

The Court: Objection overruled.

Mr. Mack: May the Reporter read the question pending, Your Honor?

The Court: Yes.

(The Reporter read the question as follows:

"And didn't you suggest that he should not be permitted to act as an attorny?")

The Witness: I don't remember what I suggested. If you have a letter that I wrote, I think it would probably say what I said. I just don't remember.

By Mr. Mack:

Q. Does the third page of that document I just handed you refresh your recollection that you did say what I just suggested you have said? A. Sir, do you mind if I read the entire letter?

The Court: Surely.

The Witness: Thank you, sir.

(Pause.)

The Witness: Your question again, please?

149 The Court: Will you read the question?

(The Reporter read the question.)

The Court: Suppose you reframe your question.

By Mr. Mack:

Q. Does reading that letter refresh your recollection that you did in fact write to the Bar Association Ethics Committee and state that Mr. Collins should not be permitted to act as an attorney advising clients? A. I did say that, sir.

Q. Do you know if Mr. Collins is anti-Semitic? A. I don't know.

Q. Do you know if he practices bigotry? A. I don't know.

Q. Do you believe that he is anti-semitic? A. I don't know. I have no belief.

Q. You have no belief? A. No, sir.

Q. Do you believe that he practices bigotry?

The Court: You have asked him that a moment ago.

Mr. Mack: I thought I asked him if—perhaps I did. I guess I am repeating myself, Your Honor.

I have no further questions, Your Honor.

150 The Court: Do you wish to cross-examine at this time?

Mr. Hayes: No, Your Honor, I do not. I will call him at the proper time.

The Court: You may step down.

Mr. Mack: If Your Honor please, I wish at this time to offer a small portion of the deposition of Sidney J. Brown taken March 15, 1965, on page 32. I believe the deposition in question is not in the file, Your Honor. I believe it is a separate deposition.

The Court: It is in the file. What page?

Mr. Mack: 32, Your Honor.

The Court: Very well.

Mr. Mack: Beginning with the second question:

"Q. When you gave the statement which you gave of a couple of million dollars, was that an estimate of the value of everything that is in yours and your wife's name?

"A. No. I figured if she and I agreed"—

Mr. Hayes: If Your Honor please, may I ask Your Honor as to whether or not this is a deposition? The Witness is here.

The Court: I know, but this is an admission
151 against interest. It is admissible.

Mr. Hayes: On the theory that it is an admission against interest?

The Court: There is a difference between a deposition of a party and a deposition of a witness who is not a party. If Mr. Brown was not a party to the law suit and he was present, of course his deposition could not be read. But being a party to the law suit, his deposition can be read as an admission against interest.

I will allow it.

Mr. Hayes: If that is the theory upon which Your Honor is allowing it—

The Court: You may proceed.

Mr. Mack: "A. No. I figured if she and I agreed to liquidate everything, I think somewhere along the line my share would be about two million dollars.

"Q. And hers would be around two million?

"A. Yes."

* * * * * * * * * *

A. Slater Clarke

152 Direct Examination

By Mr. Mack:

Q. Mr. Clarke, will you tell us your full name and residence, please? A. My name is A. Slater Clarke. My residence is 5401 Kirkwood Drive, Washington 16, D. C. That is actually in Maryland.

Q. What is your occupation or profession? A. I am an attorney.

Q. And are you admitted to practice before this Court? A. I am.

Q. Are you the attorney who filed Civil Action 1971-64?

The Court: I think you ought to identify the action by name as well as by number.

Mr. Mack: Very well, Your Honor.

Q. That would be the case of United Cork Companies vs. Esther Eden, Sidney J. Brown, Regional Construction Company, and First National Realty. A. The action number is correct. Some of the defendants' names were not correct as you gave them to me.

Q. I believe it was Beltway Regional Center as you filed it. A. That is correct.

153 Q. Will you tell us who the parties were, sir? Will you correct us on the names of the parties? A. The title of the suit was United Cork Companies, Inc., a body corporate, against Esther Eden, Beltway Regional Center, Inc., a body corporate, First National Realty Corporation, a body corporate, and Sidney J. Brown.

Q. On what basis were you retained in the case so far as fee is concerned? A. I was retained on a contingent fee basis.

Q. What was the percentage of the fee of the recovery? A. Thirty percent of the amount recovered.

Q. Who retained you in that case? How did you happen to be associated with it? A. I was brought into the case by Richard Macostic of the New York law firm of Sherman and Sperling.

Q. Did that case actually go to trial? A. It came on before Judge Curran for trial, but we did not actually proceed to introduce evidence. It was settled at that time.

Q. And had you taken any other action in the case up until that time? A. Yes.

154 Q. What had you done? A. Well, additionally, we filed the complaint. It was titled a petition to enforce a mechanic's lien.

Q. Would this be Mechanic's Lien No. 37-64 that you were seeking to enforce? A. That is correct.

Q. Go on, sir. A. After filing that there were motions that were filed. One was filed by the defendant to dismiss. I believe we had a motion for appointment of a receiver. There were depositions subsequently taken. There was pretrial that we took and other discovery and investigation that we made of the case as things went along.

Q. When was the case actually settled? A. It was in late January of 1965.

Q. What was the amount of the settlement? A. $22,000.

Q. And what was your fee? A. $6,600.

Mr. Mack: No further questions, Your Honor.

The Court: Any cross-examination?

Cross-Examination

By Mr. Hayes:

Q. Just one question, Mr. Clarke. You spoke of
155 an application for a receivership. That was denied in this case, wasn't it, sir? A. I don't know whether it was denied or whether we pressed it. I don't recall. The court docket would be better evidence than what I recall of it.

Q. Do you have any recollection that there was a receivership appointed. A. No, there was no receivership appointed.

Q. All right. Have you had any personal dealings with Mr. Brown? A. Prior to this time?

Q. Yes, sir. A. Yes.

Q. You said prior. Have you had any prior or subsequent to it? A. Not subsequent, that I recall. Prior, yes.

Q. But you had had dealings with him prior to this time? A. Yes.

Q. And they were pleasant, were they, sir? A. The only time—yes, I'd say they were.

Mr. Hayes: All right, sir.

The Court: Anything further?

Mr. Mack: I have nothing further. May this wit-
156 ness be excused?

The Court: The witness may be excused.

Mr. Hayes: Just one other question, Mr. Clarke, that I should have asked you, perhaps.

By Mr. Hayes:

Q. Did you and Mr. Brown talk about settling this matter? A. From the time I got into it there were numerous conversations concerning settlement. I don't recall speaking with Mr. Brown specifically, but through his attorney, Mr. Bernstein. But as usual there were terms and conditions and we didn't arrive at any settlement until we came on before Judge Curran that day.

Q. But there were attempts to settle it through Mr. Brown's attorney, Mr. Bernstein? A. Oh, yes.

Mr. Hayes: No further questions.

Mr. Mack: I have nothing further.

The Court: The witness may be excused.

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Hugh W. Duffy

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

157 Direct Examination

By Mr. Mack:

Q. Mr. Duffy, will you tell us your name and where you live, please? A. Hugh W. Duffy. 412 5th Street, Northwest.

Q. What is your occupation or profession? A. Process server.

Q. Mr. Duffy, have you ever had a conversation with Sidney Brown concerning Dennis Collins? A. Somebody called me on the phone and said it was Sidney Brown.

Q. Can you fix the time? A. I don't know how many years ago. It was several years ago.

Q. Several years ago. And he identified himself as Sidney Brown? A. He did.

Q. What was the telephone conversation?

Mr. Hayes: I object to it, if Your Honor please.

The Court: Objection sustained.

Will counsel come to the bench, please.

(At the Bench:)

The Court: I am sustaining this objection solely
158 on the ground that there is no identification of the person at the other end of the telephone.

Mr. Hayes: That is right. That was the purpose and point of my objection.

(In Open Court:)

By Mr. Mack:

Q. Will you tell us what a process server is, Mr. Duffy? A. Well, generally I am appointed by the court for summons.

Q. You serve different court papers on persons? A. That is right.

Q. Have you ever had occasion to serve any papers on Sidney J. Brown? A. Yes, I have.

Mr. Hayes: I object to that, if Your Honor please.

The Court: Well, this may be preliminary. I will allow it.

Q. On how many occasions have you served Sidney J. Brown?

The Court: Just a moment. I am going to ask counsel to come to the bench.

159 (At the Bench:)

The Court: I am going to ask you to state what you expect to elicit from this witness because this may be very irrelevant and very prejudicial, both.

Mr. Mack: Simply that he's had much personal contact with Mr. Brown and I hope he will recognize his voice.

The Court: I see. Well, you don't have to show that he served a lot of papers on him. I am going to sustain that objection.

Mr. Mack: I will not show the nature of the content.

The Court: It doesn't make any difference. I don't care what the nature is. They may have been perfectly innocuous, but that raises the impression that there were a lot of actions against him.

Mr. Mack: Yes, sir.

(In Open Court:)

By Mr. Mack:

Q. Have you met Mr. Brown face to face on any occasions? A. Yes, I have.

Q. On how many occasions would you say you have met him face to face? A. I'd say a couple of times. I am not positive.

Q. And from your contact—did you speak to him
160 on these occasions? Or let me put it another way: did he speak to you? A. Yes; I served him a paper in his office up on F Street. We had a conversation then. And then later—

The Court: I suggest, Mr. Duffy, that you confine yourself to just answering the question.

Will you read the question again, please?

(The Reporter read the question as follows: "Did he speak to you?")

The Witness: Yes, he did.

By Mr. Mack:

Q. On how many occasions has he spoken to you? A. Well, I remember when I served—

Q. Just tell us the number of occasions, if you will. A. I'd say twice, as far as I can remember.

Q. And do you remember how long those conversations face to face were? A. Oh, I'd say less than a minute.

Q. Based upon your face to face conversations with Mr. Brown are you able today to identify the person who called you on the occasion you referred to and identified himself as Sidney J. Brown?

Mr. Hayes: I object to it, if Your Honor please.

161 The Court: I think this calls for a yes or no answer. I will allow the question.

The Witness: Would you repeat that, please?

(The Reporter read the last question.)

The Witness: No, because I didn't know Mr. Brown at that time.

By Mr. Mack:

Q. You mean these face to face conversations—

The Court: He has answered your question. Please don't put your own interpretation on his answer.

Mr. Mack: I have no further questions, Your Honor.

The Court: Very well. You may step down.

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163 (At the Bench:)

The Court: What do you expect to prove by this witness?

Mr. Mack: I expect to prove, Your Honor, that his reputation for honesty and integrity are excellent.

The Court: Any objection?

Mr. Hayes: Yes, Your Honor.

The Court: Objection sustained.

That is perfectly valid type of testimony in a criminal case, but in a civil case you can't prove reputation as to character.

Mr. Mack: I am attempting to prove his reputation as to the statements which were allegedly made by Mr. Brown, namely, anti-Semitic, bigotry, fraudulent.

The Court: In a civil action, not even an action for defamation, you may not prove—reputation evidence is not admissible. Now if there was a witness whose
164 veracity was being impeached, that is a different proposition; but I don't see that Mr. Collins' veracity has been impeached at this trial.

I don't think that is admissible.

Mr. Mack: Well, I was also going to ask this witness Mr. Collins' reputation for tolerance and brotherhood, in an endeavor to meet this allegation of bigotry and anti-Semitism.

The Court: Mr. Mack, truth is an affirmative defense. In an action for defamation the plaintiff doesn't have to prove falsity of a defamatory statement. Moreover, this type of evidence is not competent in a civil case.

I will sustain the objection.

Mr. Mack: I do not wish to argue with Your Honor, but may I submit to you a case that I have found in the District of Columbia that appears to be relevant?

The Court: Yes, you may.

Gentlemen, too many lawyers forget that a trial lawyer has to accomplish two things, especially when he represents the plaintiff. It isn't enough to win the case in the trial court, you have got to be able to sustain the verdict later on.

Many years ago in my early days at he bar I used to practice in New York City and there was a very
165 prominent jury trial lawyer, one of the leaders of the trial bar. I won't mention his name. Of course

he has been dead many years. It used to be said about him that he never loses before a jury but he never wins in the appeals court.

So many plaintiffs' lawyers when they are getting along fine try to lead me into admitting inadmissible evidence.

Now what have you got here?

Mr. Mack: I have the case of Washington Post v. Chaloner, at 47 App. D.C. 66, Your Honor, and I have marked the portion at page 73 which appears to me—

The Court: I want to see who wrote this. Chief Justice Smythe.

(Pause.)

The Court: Are you familiar with this case? Would you like to take a moment to look at it?

Mr. Hayes: Yes, I would.

The Court: You can go back to counsel table and read it conveniently.

Mr. Hayes: Thank you.

(In Open Court:)

(Pause.)

The Court: What is the citation to that case?

Mr. Mack: 47 App. D.C. page 66.

166 The Court: You may come back to the bench, gentlemen.

(At the Bench:)

The Court: Do you wish to comment on it?

Mr. Hayes: Of course, I don't know what the reverend's answer is going to be.

The Court: I am inclined, in the light of the decision of the Court of Appeals in Washington Post Co. v. Chaloner, 47 App. D.C. 66 at page 73, to admit the evidence of reputation.

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173 Mr. Mack: May I borrow the file in this case, if Your Honor please? There is a portion of the pleading that I wish to offer in evidence.

The Court: The Court will take judicial notice of the pleadings. You don't have to offer them in evidence formally. Just what do you wish to do?

Mr. Mack: I am speaking specifically of page 1 of the pretrial order, in which the defendants allege that whatever was said by Mr. Brown was true. I believe it goes on the issue of—

The Court: Just where is it in the pretrial order? Do you have the pretrial order? You can't offer evidence from memory, you know.

Mr. Mack: This is in the second full paragraph, Your Honor, after the words "The defendants"—

174 The Court: Second full paragraph of what?

Mr. Mack: Page 1 of the pretrial order, the paragraph begins "The defendants," and after the first semicolon it says, "assert that any statement made by Brown was true and they rely on truth as a defense."

I offer that statement in evidence.

Mr. Hayes: If Your Honor please, as far as the question of statement is concerned, any statement made by him, I would imagine any statement allegedly made by him, because there are statements, of course, which have been denied as far as the defendant is concerned—

The Court: Suppose you gentlemen come to the bench. I don't want to have any discussion in open court.

(At the Bench:)

The Court: I presume that this is being offered in aggravation of damages. A plea of truth is admissible for that purpose.

Now what is your point?

Mr. Hayes: Well, the point is that a pretrial statement, in my opinion, the suggestion that any statement made by him was true, should not preclude proof indicating

that some of the statements alleged to have been made by him—

The Court: It won't preclude your proof, no.

But I presume you are offering it on the issue
175 of malice.

Mr. Mack: Yes, Your Honor.

The Court: I will admit it for that purpose.

That won't preclude you from offering proof that some of them are true and some of them are not.

Mr. Hayes: That is what I had in mind, Your Honor, that it would not preclude—

The Court: I asked you gentlemen to come to the bench in order to clarify these matters.

Mr. Hayes: Yes, Your Honor.

(In Open Court:)

Mr. Mack: Your Honor, that is the last offer I have of evidence.

I have two witnesses as to reputation, both members of the bar, one engaged before another court and one before a board meeting.

The Court: No, please, you must not make a statement like that, for obvious reasons.

Mr. Mack: Well, I have two other witnesses available, Your Honor—who are not available, who had indicated they would testify.

The Court: No, you must not state what a witness will testify. I am going to ask counsel to come to the bench.

176 (At the Bench:)

The Court: Mr. Mack, this is highly irregular. The jury hears that; that almost makes as much of an impression on them as though the witnesses were here.

You either rest or if you want a continuance, ask for it, but don't make a statement in open court that you have two more witnesses who will testify so-and-so but who happen to be too busy to come.

Mr. Mack: Well, I would ask Your Honor, in view of Your Honor's indication that you are going to recess at 3 o'clock, if Your Honor would consider recessing now so that I might—

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179 **Sidney Sachs**

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

Q. Mr. Sachs, will you tell us your name and residence, please? A. My name is Sidney Sachs. I live at 2717 Daniel Road, Chevy Chase, Maryland.

Q. What is your occupation or profession? A. I'm a lawyer.

Q. How long have you been admitted to practice in the District of Columbia? A. About twenty-five years, sir.

Q. Do you presently hold any offices in the District of Columbia in your professional capacity? A. I do.

180 Q. What is that office? A. I am President of the District of Columbia Bar Association.

Q. Do you know the plaintiff in this case, Dennis Collins? A. I do.

Q. How have you come to know him? A. I have known him as a fellow practitioner during practically all the years of my practice.

Q. And how long has that been? A. Approximately twenty-five years.

Q. Do you know what Dennis Collins' reputation among the lawyers of the District of Columbia is for professional honesty and integrity? A. I think I do.

Q. What is that reputation, sir? A. I think he has an excellent reputation for those qualities.

Mr. Mack: No further questions, Your Honor.

The Court: Any cross-examination?

Mr. Hayes: I have no questions, sir.
The Court: The witness may be excused.
The Witness: Thank you, Your Honor.

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181 Mr. Hayes: I wanted to make a motion also as to Sidney Brown on the question of qualified privilege. I have made some notes as to cases that I
182 would want to call to Your Honor's attention.

The general rule, as I understand it, is demandatory—it is qualifiedly privileged when published between parties who have a common business interest in the subject matter, but there is no privilege if the communication is made with actual malice or where the privilege is exceeded.

Now, this policy was first adopted in White v. Nicholls, U.S. 44, at page 266.

The Court: What case was that?

Mr. Hayes: White v. Nicholls. And that was adopted also in the case of Bailey v. Holland, which is an early case, 7 Appeals D.C.

The language in the White v. Nicholls case—and I call Your Honor's attention to the particular part of it which we believe to be significant:

> "Wherever the author and publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; . . ."

and this is the particular language which I now want to stress:

> "or a letter written confidentially to persons who employed A. as a solicitor, conveying charges injurious to his professional character in the manage-
> 183 ment of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested, . . ."

The Court: I think that is all clear, and I don't question that these are principles of law—I don't question the accuracy of these principles of law as you have stated them—but I don't think this was a qualified privilege occasion.

Mr. Hayes: As I said, that is the reason that I thought that this language might have significance:

> ". . . or a letter written confidentially to persons who employed A. as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter was also interested, . . ."

The Court: What case is that?

Mr. Hayes: That is the case, if Your Honor please, of White v. Nicholls.

The Court: What is the citation?

Mr. Hayes: 44 U.S. 266. 11 Law Edition—

The Court: Just a moment. I don't need the Law Edition citation. I have the volume in chambers.

Mr. Hayes: Yes, Your Honor. Now, as I said, that was followed in Bailey v. Holland, to which I have just made reference.

184 (The Court asked the Marshal to obtain the book.)

The Court: Go ahead, Mr. Hayes.

Mr. Hayes: In Blake v. Trainer, 79 U.S. App. D.C. 360, the defense of qualified privilege was said to have been lost.

The Court: What?

Mr. Hayes: The case said it was lost, but in its opinion, it says:

> "A communication is privileged when it relates to a matter of interest to one or both of the parties to the communication and when the means of publica-

tion adopted are reasonably adapted to the protection of that interest."

And it cites Prosser on Torts.

The Court: I think that undoubtedly these are basic principles, and I am not going to trouble you to demonstrate them. The Court agrees with you. The only question is whether this particular occasion was a privileged occasion.

I would like to ask you, Mr. Mack: What is the plaintiff's position? There can be two possible positions, of course. One is that this is not a qualified privilege. The other can be that this is a qualified privilege occasion, but that the qualified privilege is destroyed by actual malice. Which position do you take?

185 Mr. Mack: I want Your Honor to do what is right, because, as Your Honor pointed out—

The Court: I am going to rule that this is not a privileged occasion. But, even if it were, the Court would not be justified in directing a verdict in favor of the defendant, because then there would be a question as to whether the privilege was destroyed by actual malice, which is a question of fact. So, on both of those grounds, I think that I must deny the motion.

Mr. Hayes: I see, Your Honor.

(End of the Bench Conference.)

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Mr. Hayes: Will you call Mr. Sadur, please.

Thereupon

Marvin Sadur

called as a witness by the defense, being first sworn, was examined and testified as follows:

Direct Examination

By Mr. Hayes:

Q. Will you give His Honor and the ladies and gentle-

men of the jury your full name, please? A. My name is Marvin Sadur.

The Court: Oh, no. Every one has to hear you, and some of the jurors are quite a distance away from where you are sitting, so would you mind speaking slowly,
186 loud and distinctly like the Court is doing. I suggest that you get closer to the microphone. That might help you.

Will you state your name again, please.

The Witness: My name is Marvin Sadur.

The Court: How do you spell your last name?

The Witness: S-a-d-u-r. S-a-d—like in "David"— u-r.

The Court: Sadur. And what is your first name?

The Witness: Marvin.

The Court: Thank you.

By Mr. Hayes:

Q. Mr. Sadur, what is your address? A. My home address is 6006 Neilwood Drive in Rockville, Maryland. My office address is 1835 K Street, Northwest, in Washington, D. C.

Q. And what is your profession, sir? A. I'm an attorney.

Q. And for how long a time have you been a member of the bar? A. Since 1949.

Q. And have you had any special field in which you conducted your practice? A. In the field of public contracting is where my main endeavor is.

187 Q. And does that have to do with such things as mechanic's liens? A. It has to do with creditor rights of contractors and subcontractors and the rights—

The Court: Keep your voice up. I suggest that you get closer to the microphone.

The Witness: I think the microphone is reverberating.

The Court: Just get a little closer to it.

The Witness: Yes, sir.

The Court: You may proceed, Mr. Hayes.

By Mr. Hayes:

Q. All right, sir. Will you answer my question as to the field in which you have specialized? A. In the field of public contracting, involving the creditor rights of subcontractors and contractors and owners of surety companies, the whole field of construction.

Q. Does that include, sir, the relationship of contractors and subcontractors with respect to the filing of mechanic's liens? A. Yes, sir.

Q. Will you explain to us, sir, the purpose of the filing of mechanic's liens? A. Well, a mechanic's lien is—

The Court: This is a question of law. We don't
188 need expert testimony.

Mr. Hayes: I'm sorry, sir. I will reframe my question, if Your Honor please.

The Court: Very well.

By Mr. Hayes:

Q. With respect to the question of a subcontractor's rights, will you tell us what is done as far as the filing of a mechanic's lien is concerned, and the purpose for which it is done? A. If a subcontractor feels, I assume that is the purpose for drafting it,—he is not being paid for his work?

Q. That's correct. A. He has a remedy in the District of Columbia, under the D. C. Code, of asserting a lien against the property where he is performing this work to gain a security, as it were, for the payment of his debt.

Now, you mentioned "subcontractor." A subcontractor is one who is performing the work for a prime contractor, I assume; and he, in turn, is doing the work for an owner or for somebody who wants a piece of property improved.

The subcontractor seeking his lien must, within a certain period of time, file a notice with the Clerk of this

Court and give notice of that lien to the owner of the property so that the owner can be aware of the fact
189 that this subcontractor has not been paid. And if, in turn, the owner has not at that time paid the prime contractor, he would be under a duty to not pay that money until the matter of the lien is resolved.

The matter of notice is important for the subcontractor, because if he fails—

Mr. Mack: Your Honor,—

The Court: Let him finish his answer. Then I will hear you. You may proceed.

The Witness: If he fails to give a notice to the owner, and the owner is unaware of the fact that a lien has been filed by such a notice and continues to pay the prime contractor, to the extent that the owner fulfills his obligation to the prime contractor and pays for the work performed, leaving no other money left under this contract, the subcontractor loses any protection he has by his lien.

The Court: Mr. Mack, the Court will hear you now.

Mr. Mack: My objection, Your Honor, is that the witness's answer is argumentative. He is going into matters of law which are properly for the Court.

The Court: I am going to sustain the objection. This is not a matter for either fact testimony or expert testimony. If there is any question of law involved
190 and if the jury has to be informed concerning any matter of law, the Court will instruct the jury.

Mr. Hayes: Your Honor, if you will respectfully allow me an exception, there has been testimony tending to show that the persons who were notified were persons other than—

The Court: I understand that, but the witness's testimony so far relates to matters of law on the construction of the Mechanic's Lien Statute. If that becomes relevant and if the jury needs to be informed of it, the Court will instruct the jury, because that is a question of law.

Mr. Hayes: Will Your Honor allow so much of the answer to stand—

The Court: Oh, I am not going to strike the answer, but I will not permit any further inquiry along this line. However, I see no object to be served by striking out the answer.

Mr. Hayes: May I approach the bench, Your Honor, because of course I want to stay within Your Honor's ruling.

The Court: Yes.

(At the Bench:)

Mr. Hayes: May I ask him as to whether or not, in his opinion, it is a requirement that the owner of record, the record owner, should be named?

191 The Court: If, in his opinion, what?

Mr. Hayes: If, in his opinion, it is a requirement that the record owner should be named?

The Court: How does that affect the issues of this case?

Mr. Hayes: Because, if Your Honor please, one of the issues is that Mr. Collins, having seen Mr. Brown as being a party in interest, did not perform in the manner in which one ordinarily would with respect to the protection of the subcontractor by the filing of notice.

The Court: Is it your contention and do you want to raise the point that Mr. Collins did not properly protect his client's rights? Is that correct?

Mr. Hayes: That is correct.

The Court: I don't think I am going into that.

Mr. Hayes: Well, Your Honor will remember also that one of the questions was as to whether or not, after the time that Mr. Collins was employed, whether or not they did not continue to try to amicably adjust the matter, and whether or not—

The Court: Do you object to the testimony, Mr. Mack?

Mr. Mack: Yes, Your Honor.

The Court: I will sustain the objection, because
192 this is not a case of Mr. Collins suing for a fee for legal services. He does not even have a right to show that he did not perform the services in alleging the special damages, because the fee that his successor received in the case presumably he would have received if he had not been discharged. There is no proof here that the lien was amended or that a new lien was filed, or even that there was time to file a new one. No, I will sustain the objection.

Mr. Hayes: If Your Honor please, it goes to the question of the truth of the situation as well. The question—

The Court: It goes to what?

Mr. Hayes: The question of truth.

The Court: Truth of what?

Mr. Hayes: As to whether or not Mr. Collins was actually discharged because of the fact of what was said, or because of the fact that he improperly protected the interests of his client.

The Court: No, I will sustain the objection. I don't think it goes to that at all, because while, of course, you will be at liberty to show that Mr. Collins' client came to the conclusion that Mr. Collins wasn't properly handling the matter, and—

Mr. Hayes: And wouldn't—

The Court: —therefore discharged him.

193 Mr. Hayes: And, Your Honor,—

The Court: Just a moment.

Mr. Hayes: Excuse me.

The Court: However, I don't think you are at liberty to show by expert testimony that Mr. Collins didn't properly handle the matter, unless you are going to show that Mr. Collins' client knew it and acted on that.

Mr. Hayes: Well, we think also that it goes to the question of whether or not Mr. Collins was motivated by a personal grudge, rather than—

The Court: I will sustain the objection.

(End of the Bench Conference.)

By Mr. Hayes:

Q. Will you explain to us, Mr. Sadur, what the record situation is in the Recorder of Deeds Office, as to where one goes to find the ownership of property?

The Court: How is that relevant? Is that along the same line that you indicated at the bench?

Mr. Hayes: I had not thought so. If Your Honor thinks so, then I shall not ask the question.

The Court: If this question is asked for some other purpose, I am perfectly willing to have you state that to the Court.

Mr. Hayes: Well, shall I come to the bench again, 194 Your Honor?

The Court: I think you had better. Come to the bench, gentlemen.

(At the Bench:)

Mr. Hayes: Your Honor, we do have what we conceive of as being some evidence that the failure of doing this in the right way was one of the things that actuated the client in the removal of Mr. Collins.

The Court: Yes, I will let you show that, but, first as to the order of proof, I insist that you first prove that plaintiff was discharged for the reason you state. Then you can prove that Mr. Collins did not properly handle the matter. But I won't let you take the reverse procedure and show that the matter was not properly handled unless you first show that was the reason for the discharge, because suppose, for example, that you fail to show that that was the reason for the discharge, in the meantime you have prejudiced the other side, I think erroneously; so I will exclude this, if you object.

Mr. Mack: I do so object, Your Honor.

The Court: Objection sustained.

(End of the Bench Conference.)

Mr. Hayes: Would Your Honor indulge me just a second in the light of the situation?

195 The Court: Surely.

Mr. Hayes: May we come to the bench again so that I might ask a question and Your Honor may rule on it before I ask the witness?

The Court: Surely.

(At the Bench.)

Mr. Hayes: Would Your Honor allow me to ask the question as to whether or not it is usual to notify an equitable owner, and if so, whether or not they can be notified to the exclusion of the record owner?

Mr. Mack: I object for the same reasons, Your Honor.

The Court: Objection sustained, because, as I say, this all would be relevant if Mr. Collins was suing for compensation for legal services and if the contention was that he didn't perform the services properly, but I don't believe that is relevant to the issues of this case.

Objection sustained.

Mr. Hayes: Well, I would like the record simply to show that we made the proffer as to asking these various things on the theory of truth and on this other ground.

The Court: Very well.

Mr. Hayes: Thank you, Your Honor.

(End of the Bench Conference.)

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196 **Sidney J. Brown**

called as a witness in his own behalf, having been previously sworn, resumed the witness stand and further testified as follows:

The Deputy Clerk: The witness has been sworn.

The Witness: Yes, I have.

Direct Examination

By Mr. Hayes:

* * * * * * * * * *

Q. Directing your attention, Mr. Brown, to the
197 premises, 2146 Queens Chapel Road, Northeast, when, sir, did that property first come to your attention? A. Some time in the latter part of 1961.

Q. And how, sir? A. I received a brochure in the mail from an advertising agency, Alvin and Stein, I believe, who offered the property for sale.

Q. Will you look at this, sir, and tell me what this is? A. (Perusing the document.) This is a letter offering for sale the property we just mentioned, 2146 Queens Chapel Road.

Mr. Hayes: If Your Honor please, I would like to offer it.

Mr. Mack: No objection, Your Honor.

The Court: Let it be admitted.

The Witness: I know it was offered for rent or for sale.

Mr. Hayes: I didn't hear you, sir?

The Witness: It was offered for rent or for sale.

The Court: Let it be admitted.

(Defendants' Exhibit No. 1, Letter offering 2146 Queens Chapel Road for rent or for sale, was received in evidence.)

(The exhibit was shown to the Court.)

198 The Court: You may proceed.

By Mr. Hayes:

Q. What, sir, did you do after the time that this notice came to you? A. I happened to be talking to a friend of mine by the name of Hyman Kaplan, a business man here in town. He operates the Stewart's Auto Upholstery business at 2525 M Street, Northwest. And he indicated his need for a building for business because he was in the process of selling that building on M Street. And when I

talked to him about the building, I discovered that he also had received a circular brochure. Apparently it had been sent out all over the city to possible warehouse users.

And we decided that we would go take a look at it. And I contacted Epstein, got a key to the property, and we went out and looked at the property with Mr. Kaplan.

As a result of our inspection of the property, Mr. Kaplan signed a contract, some time—well, actually, not as I recollect,—this paper laid on my desk for a long time. I don't think it was until some time in February of 1962 that we actually went to look at the property. And then it was the early part of March when Mr. Kaplan made an offer on the property in the form of a contract, which I carried over to Mr. Epstein's office.

199 Q. I show you this, sir, and ask you as to what it is? A. (Perusing the document.) This appears to be the offer which Mr. Hyman Kaplan made for the purchase of the Queens Chapel Road property.

Mr. Hayes: I would like to offer this, if Your Honor please.

Mr. Mack: I object, Your Honor. I believe that Mr. Kaplan should be here to identify his signature and prove the document.

The Court: Let me see it.

(The document was handed to the Court.)

The Court: If that is the only objection, I will overrule the objection, because I infer that the witness is identifying Mr. Kaplan's signature.

Mr. Mack: I also object, Your Honor, for the reason that this document is offered as to proof of what it contains. I believe it constitutes hearsay, even though it is a written document.

The Court: You believe that it constitutes what?

Mr. Mack: Hearsay, even though it is a written document.

The Court: It is not hearsay, but I think that it is absolutely irrelevant. I sustain the objection.

Mr. Hayes: Your Honor will allow the exception,
200 of course.

The Court: Surely.

(Defendants' Exhibit No. 2, Offer of Hyman Kaplan, for the purchase of Queens Chapel Road property, was marked for identification.)

By Mr. Hayes:

Q. As a result of this—well, as a result of whatever happened between you and Mr. Kaplan, what occurred? A. Well, there were negotiations with Mr. Epstein and also his attorney.

The Court: I might say that the reason I ruled that this document is irrelevant, I think that all of these events leading up to the purchase of the property by the witness, if he did purchase it, are not relevant to the issues in this case. I always insist on holding to the issues in a case.

Mr. Hayes: Of course I shall conform to Your Honor's ruling. There is, however, testimony before this jury which would purport to show that Mr. Kaplan was not a person in such interest as to require notice; and it seems to me that we would have a right to prove that Mr. Kaplan was, in fact, the purchaser and owner of the property.

The Court: As I indicated at the bench a few moments ago, it is absolutely irrelevant to the issues of this case as to who should have or should not have been
201 served with notice of the lien.

Mr. Hayes: Well, on the issue of truth, if Your Honor please, this is the reason for my asking it. Of course, as I see it—

The Court: Of course, the issue of truth relates to the alleged defamatory statements. You have a right to show, if you choose to do so, that the alleged defamatory statements were true; but this line of evidence does not bear upon that issue at all.

Mr. Hayes: One of the statements allegedly made was that Mr. Collins was not concerned about doing the thing

correctly, but, rather, was simply concerned with the idea of taking or getting back or doing something adverse as far as Mr. Brown was concerned.

The Court: Personally, I think that that is the least important of the statements. Anyway, I think that this is too remote.

Mr. Mack: May I approach the bench, Your Honor? I think that I may be able to stipulate with Mr. Hayes and shorten his proof in this area.

The Court: Very well.

(At the Bench:)

Mr. Mack: Your Honor, I have a certified copy of the deed to Mr. Kaplan, which I—

202 The Court: Just a moment. Are you trying to convince me that my ruling was wrong?

Mr. Mack: No, Your Honor.

The Court: Very well. When the Court rules in favor of counsel, the thing for counsel to do is to keep still.

Mr. Mack: Very well. I thought that I might be able to shorten it.

(End of the Bench conference.)

The Court: You may proceed, Mr. Hayes.

Mr. Hayes: Thank you, Your Honor.

By Mr. Hayes:

Q. Mr. Brown, did there come a time when someone as a representative of the United Cork Company—or what was your first relationship with the United Cork Company in this matter? A. Are you referring to my personal relationship, or the relationship of one of my companies, sir?

Q. Well, what was the first relationship of which you had knowledge, either directly or by one of your companies? A. Sometime in 1963, I would say possibly June or July or somewhere in there, we—that is the Regional Construction Company—entered into a contract with the

United Cork Company to have the United Cork Company do some installation work at 2146 Queens Chapel Road.

United Cork was one of twenty-five or thirty
203 subcontractors, as I recollect, engaged by Regional Construction Company, the prime contractor, to remodel these premises for Mr. Kaplan.

Q. And did there come a time when the work was completed and you were contacted about that? A. Yes. Toward the end of 1963, there were a number of calls that I was made aware of by the Vice President of Regional Construction regarding payment for the work which United Cork was demanding at that time.

Q. I show you this, sir, and ask you as to what it is? A. This is a letter—

Mr. Hayes: Just a moment. I suppose I should offer it. I offer it in evidence, Your Honor.

Mr. Mack: No objection, Your Honor.

The Court: Let it be admitted.

The Deputy Clerk: Defendants' Exhibit No. 3 in evidence.

(Defendants' Exhibit No. 3, Letter dated 12-23-63, from Mr. Kwaczy to Mr. Brown, was received in evidence.)

The Court: You may read it to the jury, if you wish.

Mr. Hayes: Thank you, Your Honor. It is very short, and I will be glad to read it to the jury.

(Whereupon, Mr. Hayes read Defendants' Exhibit No. 3 to the jury.)

204 By Mr. Hayes:

Q. Now, this letter evidenced, Mr. Brown, that a note had been given for this work by Beltway Regional, and that you had been called upon and had actually personally endorsed it, is that correct, sir? A. Yes, that is so. They didn't want to take Regional's note without my endorsement.

Q. All right, sir. Now, what happened when the note came due on February the 3rd? A. We had it arranged financially for Mr. Kaplan at that time. You see, the payment for the work which was done on the building was supposed to come from the loan to be obtained on the property, and we hadn't arranged the financing, so that there weren't funds to pay the note; and in order to avoid their filing a lien on the property, I once again offered to renew the note and to re-endorse it, so that we could have a little more time in order to work out the payment.

Q. I show you this, sir, and ask you as to what it is? A. (Perusing the document.) It's a letter from United Cork to me as President of Beltway Regional Center.

Mr. Hayes: All right. Just a second. If Your Honor please, I want to offer this.

Mr. Mack: No objection, Your Honor.

The Court: Let it be admitted.

205 (Defendants' Exhibit No. 4, Letter, dated 2-7-64, from Mr. Wilson to Mr. Brown, was received in evidence.)

The Deputy Clerk: Defendants' Exhibit No. 4 in evidence.

The Court: You may read this to the jury, if you wish.

Mr. Hayes: Thank you, Your Honor.

(Whereupon, Mr. Hayes read Defendants' Exhibit No. 4 to the jury.)

By Mr. Hayes:

Q. Now, after the time of the receipt of that note, Mr. Brown, what next occurred, sir? A. I believe I wrote a letter to United Cork, and I indicated that there would be no purpose in filing a lien, because we were arranging financing, and such filing would be detrimental to what arrangements we were trying to make.

And thereafter, I believe it was on the 14th of February, about a week after this letter, we received in the mail at our office three notices of intention to place a lien on 2146 Queens Chapel Road, the property involved.

I believe one was addressed to Sidney Brown, and one was addressed to First National, and one to Beltway Regional Center.

206 Q. And after the receipt of this notice of lien, what then occurred? A. Well, when I saw my name on the lien and my company's name, First National, as I stated, I felt that this would interfere with—the fact that the property was liened would interfere with the loan which was pending, because lenders normally don't like to make loans on property if they think the property is in trouble. It is a well know fact that banks like to lend money when there is no trouble; when there is trouble, they are afraid.

I was very much concerned. I was also concerned about the fact that my name had been put on the paper, which I knew would be—and my company's name would be—distributed to the crediting agency, would be picked up by all crediting agencies, Dun and Bradstreet, because they just pick up any court paper that's filed.

Q. Was it picked up by a crediting agency? A. I found out later that it was picked up by Stone's Legal Record—S-t-o-n-e-s—and also picked up by Dun and Bradstreet that a lien had been filed against Sidney Brown and First National Realty Corporation.

I sent the copies of the liens to my attorney, Sheldon Bernstein, and I inquired as to whether he thought there was a basis for an action for defamation because

207 of this apparent claim filed against my name in an attempt to obtain a lien on a piece of property.

Q. You sent this to your attorney, you said, Mr. Brown? A. Yes, I did.

Q. For his advices? A. Yes, I did.

Q. Now, in the meantime, what occurred, sir? A. Well, during the month of February, a number of calls were

made back and forth between Bonhach and the vice president of our company who was totally in charge of the project. And as a result of these calls a letter was sent from Bonhach to our office, stating that no action would be taken—

Q. Just a minute. Don't go into what they stated.

This, I take it, Mr. Brown, was after the time that the lien had been filed, is that correct? A. That's correct. Yes, sir.

Q. I show you that, and ask you what it is? A. (Perusing the document.) It's a letter from the Treasurer of United Cork to myself as President of Beltway Regional Shopping Center.

Q. Dated when? A. March 5th, 1964.

Q. And what was the date that the lien had been
208 filed? A. Well, it was filed on February 12th, but we got notice in the mail on February 14th.

Mr. Hayes: I want to offer this, if Your Honor please.

Mr. Mack: No objection, Your Honor.

The Court: Let it be admitted.

The Deputy Clerk: Defendants' No. 5 in evidence.

(Defendants' Exhibit No. 5, Letter dated 3-5-64, from United Cork to Mr. Brown, was received in evidence.)

The Court: You may read this to the jury, if you wish.

Mr. Hayes: Thank you, Your Honor.

(Whereupon, Mr. Hayes read Defendants' Exhibit No. 5 to the jury.)

The Court: May I have Plaintiff's Exhibit No. 1, please.

(The exhibit was handed to the Court.)

By Mr. Hayes:

Q. After the receipt of that letter, sir, what occurred, Mr. Brown? A. I believe Mr. Bonhach made a number of telephone calls in an effort to set up an appointment to discuss the matter of payment. He wanted to work out

some notes to effect payment in view of the situation
209 which had occurred, namely, that no lien had been obtained on the property, and the only recourse he had was the contract with Regional which he had always had, so that his position now wasn't any better than it was in December or January. And I was very much concernd about making any kind of a settlement with him in view of the possible damage to my own reputation by the filing of this unnecessary lien or paper which affected my personal credit and that of my corporation. But finally, on March 25th, which I believe was the date, the call was made from our office to George Bonhach to discuss the matter of this—of this settlement.

Q. At that time had this notice been published in the credit journals to which you have made reference? A. Yes, it had.

Q. All right, sir. Now, then what occurred? A. On the 25th, as I stated, a call was made to George Bonhach, a telephone call from my office, and I commenced a discussion with Mr. Bonhach of what the problem was in connection with trying to negotiate a settlement at this point.

I indicated to him that I found it difficult, in view of the presence of Mr. Dennis Collins in the picture, to negotiate in a reasonable manner because of my prior experience with him.

Q. Now, what prior experience was this to which
210 you made reference, if you made this reference, to Mr. Bonhach? A. Yes. I told him that some fifteen years or so before—some such period, I wasn't sure,—Mr. Collins had some client who brought a fraudulent suit against me; and that as a result of that suit there occurred some animosity on the part of Mr. Collins towards me, because there were appeals, and it was five years of attempts to collect the sum of money which he claimed, and that I couldn't negotiate with a man who bore me a grudge, and that I couldn't work out anything as long as Mr. Collins was in the picture.

My best recollection is of Bonhach telling me that there was no need to deal with Mr. Collins, he was only retained for the very limited purpose of filing a lien, and that since the lien was of no value anyway, because the property had not been tied up because he had not named the record owner, that I could work something out with him.

I explained to him, however, at that time that it was my reputation that had been injured by the filing of the lien against my name personally and that of First National Realty Corporation.

I explained to him that there was no question that we owed the money, and when I said "we," of course I meant the Regional Construction Company, the Beltway Regional

—the contractor.

211 So I think I made myself plain that as long as Mr. Collins was in this matter, I couldn't effect a settlement of the claim. As a matter of fact, I indicated to him also that getting additional money from the property was a little more difficult now that a—well, what we call a "slander of title"—by filing a claim against an individual who has no interest in the property and seeking to obtain a lien on the property.

He said he would let me know something, and I think that's the way we terminated the conversation.

Q. Now, you have been shown some letters—

Mr. Hayes: May I look at this just a second, Mr. Clerk? The one just before that, I believe.

Q. (cont.) These letters that had been received from the United Cork in an attempt to negotiate this matter were both prior to the time of the conversation to which you just made reference, is that a fact? A. Yes. That's correct.

Q. Now, after this conversation of March the 25th, what then happened, sir? A. I believe sometime in April I was informed that Mr. Collins had been removed from the case; and in view of the fact, that I spoke—I believe I

212 spoke to Mr. Bonhach, and he told me that he felt that, in view of the circumstances, the fact that my

name was spread on the record unnecessarily, and especially, I suppose, in view of the fact that they had no lien on the property as such, that they would be interested in taking some long term notes, even though seven months previously they didn't even want to give us forty-five days. But I think they recognized the fact that they had done me an injury—

Mr. Mack: Your Honor, the witness is speculating as to the reason.

The Court: I will sustain the objection. Just limit yourself to stating what happened without indicating what you think motivated somebody.

The Witness: I'm sorry, Your Honor.

The Court: That is all right. Go ahead, Mr. Hayes.

By Mr. Hayes:

Q. Well, in the conversation with Mr. Bonhach, the objection was to your saying what you thought motivated him, but you can give the conversation. A. Well, he advised me that he was sorry for what had happened, and that possibly they should not have taken the course that they had in hiring an attorney to file a lien, especially in naming me and the First National. And he suggested that we work out some title obligation to pay off
213 this loan, to pay off this debt.

Q. Did you receive a communication from Mr. Bonhach? A. Yes, I did. I received a letter—well,—

(Counsel conferred inaudibly.)

The Court: Let's proceed, gentlemen.

Mr. Mack: If Your Honor please, I have no objection to the form.

The Court: Just a moment. There is nothing before the Court.

Mr. Mack: Excuse me, Your Honor. I thought it had been offered.

Mr. Hayes: No.

By Mr. Hayes:

Q. I show you this, sir, and ask you what it is? A. (Perusing the document.) This is a letter from George Bonhach to First National Realty, discussing—

Q. Just don't go into the contents of it. A. Excuse me. I'm sorry.

Mr. Hayes: I want to offer this, if Your Honor pleases.

Mr. Mack: Objection, Your Honor. It is irrelevant, these settlement negotiations.

The Court: Let me see it.

(The document was handed to the Court.)

214 The Court: Objection overruled. Let it be admitted.

(Defendants' Exhibit No. 6, Letter dated 4-20-64, from Mr. Bonhach to First National Realty, was received in evidence.)

Mr. Hayes: May I read it, if Your Honor pleases?

The Court: You may read it to the jury, if you wish.

Mr. Hayes: Thank you, Your Honor.

(Whereupon, Mr. Hayes read Defendant's Exhibit No. 6 to the jury.)

The Court: I think we will take our mid morning recess at this time.

(Whereupon, at 11:15 a.m., the Court recessed.)

215 The Court: You may proceed, Mr. Hayes.

Let the witness resume the stand.

Mr. Hayes: If Your Honor please, I was attempting to do this in chronological order and during the recess period I find there is one communication which I left out. May I go back to that, sir?

The Court: Surely.

By Mr. Hayes:

Q. Mr. Brown, I show you this and ask you what it is, sir? A. It is a letter addressed to me, Sidney Brown, from George Bonhach, dated February 26, 1964.

Mr. Hayes: I want to offer this, if Your Honor please.

Mr. Mack: No objection, Your Honor.

The Court: Very well, let it be admitted.

The Deputy Clerk: 7 in evidence.

(Letter from Mr. Bonhach to Mr. Brown dated Feb. 26, 1964 marked Defendant's Exhibit No. 7 and received in evidence)

The Court: You may read it to the jury if you wish.

Mr. Hayes: "United Cork Companies, 806 DeSoto Road, Baltimore.

"February 26, 1964.

"Mr. Sidney Brown, First National Realty Co.,
216 629 F Street, N.W., Washington 4, D. C.

"Dear Mr. Brown: We will agree to take no further action on the lien which we have filed until April 1st if you will not interpose the defense that the lien does not apply to this property. We are interested only in settling this matter in an amicable way, our sole interest being in collecting the just charges that are due us.

"If this arrangement is all right with you will you please send us a letter acknowledging this.

"Very truly yours, George Bonhach, District Manager.

"Copies to Mr. Henry Hartlove and to Mr. R. O. Wilson."

By Mr. Hayes:

Q. Do you know, sir, what was done as a result of that communication? A. Well, my best recollection is that we after that began discussing a method of settling.

Q. Was any communication sent? A. Oh, yes, yes, I recollect now. Regional Construction Company sent
217 a letter to either Mr. Bonhach or to United Cork in which it made plain its position—

Q. Was a copy of that letter kept? A. Yes, we have a copy in the files.

Q. I show you this, sir, and ask you what it is? A. It's a letter to United Cork dated February 28, '64 from Beltway Regional Center, Inc.

Q. The letter which I just showed you is dated February 26, I believe. So this followed that? A. Yes.

Mr. Hayes: If Your Honor please, I would like to offer it.

The Court: Let it be admitted.

Mr. Mack: No objection.

The Deputy Clerk: 8 in evidence.

(Letter from Mr. Zeiba to Mr. Wilson dated February 28, 1964 marked Defendant's Exhibit No. 8 and received in evidence.)

The Court: You may read it to the jury if you wish.

Mr. Hayes: "February 28, 1964.

"United Cork Companies, Kerney, New Jersey, attention Mr. R. O. Wilson, Comptroller.

"In Re: Rath Packing Company Warehouse.

"Gentlemen: Apparently you saw fit to proceed
218 with a lien even though you were informed of our good faith and our good intentions in this matter. Inasmuch as we are not accustomed to such treatment and you have decided to seek the assistance of attorneys in order to obtain payment, we feel that the damage which has been done to our reputation by virtue of your filing this lien has a monetary value. Under these circumstances we are not disposed to liquidate this obligation, although we want to reaffirm our prior position, which was to liquidate this without delay.

"Possibly you find it more profitable to act without giving your customers an opportunity to make payment before they besmirch reputations and cause additional expenses to both sides which are wholly unnecessary.

"This matter could have been resolved in a few days had you and your attorneys not acted without undue haste

and recklessness in this matter. The filing of this lien by your attorneys without even the courtesy of the usual notice that the matter had been referred to them and an opportunity to avoid the defamation involved in
219 the filing of a lien is malicious on its face and will undoubtedly lose you thousands of dollars.

"We trust you are satisfied with what you have done. If you are, we hope you will live to regret it.

"Very truly yours, Beltway Regional Center, Inc., Steve Zeiba, Vice-President.

"Postscript: Your letter to Mr. Brown came to my attention after I wrote the above and it is indeed strange for a company to have its attorney file a lien without any notice whatsoever and then to say 'We are interested only in settling this matter in an amicable way'."

By Mr. Hayes:

Q. You were talking, Mr. Brown, prior to that, you had gotten to somewhere in April, I believe, in which you were still having conversations with Mr. Bonhach with regard to the attempted amicable settlement of this matter. Will you go on from there, sir? A. Yes. Sometime in the middle of April a settlement proposal was made by George Bonhach involving some cash and some notes and he requested that an appointment be set up for myself and for him to meet and discuss it, and an appointment
220 was set up and we did meet and I think it was on April 15th, 1964.

Q. Was there an inter-office memorandum made with respect to that? A. Yes, the offer was put in the files, and I think it was a day or so before; that is, his offer to settle.

Q. I show you this and ask you as to what it is? A. It's a memorandum to me from Mr. Steve Zeiba, who was vice-president and in charge of the company, Regional Construction, regarding United Cork.

Mr. Hayes: I want to offer this, if Your Honor please.

Mr. Mack: No objection. I think it is irrelevant, Your Honor, but I don't object.

The Court: Well, if you are not objecting, I certainly won't exclude it.

(Memorandum from Mr. Zeiba to Mr. Brown dated April 14, 1964 marked Defendant's Exhibit No. 9 and received in evidence.)

The Court: It is part of the res gestae, Mr. Mack.

You may read it to the jury if you wish.

Mr. Hayes: "Memorandum: April 14, 1964.

"To Sidney J. Brown from Steve Zeiba.

"Re United Cork.

221 "George Bonhach of United Cork phoned this morning and gave me the following information which he had received from his home office. To release the mechanic's lien they require a substantial payment of $15,000 by May 1st with monthly serial notes covering the balance of $10,754 starting June 1st, balance to be paid in full by December 31st, 1964. Six percent interest will be charged starting with May 1st. They are willing to forego interest from the time the debt was incurred and are not requesting back interest. Mr. Bonhach would like to make an appointment with you sometime tomorrow to go over this."

By Mr. Hayes:

Q. Was such an appointment made, Mr. Brown? A. Yes, it was.

Q. Will you tell us what occurred at that time, sir? A. Mr. Bonhach renewed his proposal of this large cash payment, and I once again explained to him that financing was —I told him we had gotten some financing but we didn't have enough to pay all of the bills. They had exceeded the amount, all the monies that we could get in connection with financing of the property exceeded the amount

222 of money that was due to all parties. But also I indicated to him that I wasn't quite happy with the

still existing situation of my name having been passed around in the periodicals and the legal papers to creditors about lien having been filed against me.

He was very upset by my unwillingness to work the deal out. He said that he couldn't get paid until this thing was worked out and he was very much concerned about the fact that I was holding up the settlement. He said something about getting paid only when the company either gets cash or notes and he was anxious to consummate the transaction.

I made him, as I remember, a counter-offer involving less cash down but still willing to pay the entire amount of the judgment, as I remember.

I think this was about the sum total of our conversation.

Q. Did there come a time thereafter that you got another communication from United Cork?

The Court: I am wondering, Mr. Hayes, what relevancy all these subsequent communications has. Of course the various communications in and about the time of the subject matter of this law suit are admissible as part of the res gestae, but we are way beyond that now.

223 Mr. Hayes: If Your Honor please, I wanted to establish the fact that Mr. Bonhach from the very beginning was the one who continued the negotiations, that they were still attempting to do everything, except that the lien had been filed—

The Court: I understand, but what has that got to do with the issues of this case? I see what you want to establish. Let's assume that negotiations continued. What has that got to do with the issues of this case?

Mr. Hayes: Well, one of the issues, if Your Honor please, was as to the purpose, whether or not Mr. Collins was hired for a particular purpose. I have pursued this—

The Court: I don't think that is an issue in the case at all. The issue in the case is did the defendant make the alleged defamatory statements concerning Mr. Collins. That is what the issue is in this case.

Mr. Hayes: But one of the issues with respect to, certainly, some of the statements, as I understand it, if Your Honor please, is the truthfulness of the statements that were made.

The Court: That is correct.

Mr. Hayes: Now with respect to the question of whether or not Mr. Collins, rather than to do the thing which
224 he was called upon to do, whether or not—because this was a statement made by Mr. Brown to Mr. Bonhach—that he had gone forward in the way in which he had, which was not in accordance with the proper way of doing it, just—

The Court: This testimony does not bear on that issue. It is too remote so far as that issue is concerned. If that is the only purpose of introducing this line of testimony, I think you have exhausted it and I think all the subsequent negotiations are immaterial.

After all, we have to have terminal facilities, you know. There are other cases waiting to be tried.

Mr. Hayes: Yes, if Your Honor please. As it happened, this was—

The Court: I realize the importance of this case, but we can give just so much time to every case.

Mr. Hayes: Yes, Your Honor. This, as I say, we conceive of as being in support of our version of the truthfulness of the statement made with respect to that item.

The Court: I don't think it bears upon the truth of the alleged defamatory statements.

Mr. Hayes: All right, Your Honor.

By Mr. Hayes:

Q. Now, Mr. Brown, did there come a time when
225 suit was filed? A. A suit by United Cork?

Q. Yes. A. Yes.

Q. And by whom was it filed? A. It was filed by an attorney by the name of Slater Clarke on behalf of United Cork.

Q. And do you know when it was filed? A. My best recollection is it was filed in August or September of 1964.

The Court: Well, this a matter of record. The Clerk has just handed the file in the case to the Court. The suit was filed, according to the record, on August 11, 1964.

By Mr. Hayes:

Q. And was that case tried? A. No, it was not.

Q. How was it disposed of?

Mr. Hayes: Does Your Honor want me to take the record?

The Court: Of course the record merely notes that on the 18th day of January 1965 there is a notation: Case passed for settlement. This is the last notation on the docket.

Mr. Hayes: Then I take it, it would be appropriate
226 that I ask him as to how was it settled, sir?

The Court: You may answer.

The Witness: It was settled by allowing me a reduction in the amount claimed in view of the fact that Mr. Collins had stated that he was going to sue me for getting him out of the case or something to that effect.

Mr. Mack: I object to that.

The Court: Objection sustained.

Mr. Mack: And I ask Your Honor to instruct the jury—

The Court: Yes. The answer is stricken and the jury is instructed to disregard it. The answer goes way beyond the question.

Mr. Hays: I simply asked Your Honor permission to ask the question as Your Honor had advised that I might.

The Court: Yes, you have a right to ask the witness as to how it was settled. He said it was settled by paying somewhat less than the amount of the claim. I think that is what his answer amounted to.

Mr. Hayes: Yes, sir.

The Court: Now the rest of the answer was entirely irrelevant and improper and the Court is ordering it to stricken and the jury to disregard it.

227 Mr. Hayes: Yes, Your Honor.
You may have the witness.

Cross-Examination

By Mr. Mack:

Q. Mr. Brown, Esther Eden is your sister, is she not? A. Yes, sir.

Q. And she is a straw party for you, is she not? A. She is a straw party for First National Realty Corporation. She is secretary of that corporation and holds title for First National.

Q. She is also a straw party for you, is she not? A. I have used my sister in connection with my personal matters as well.

Q. And by a straw party you mean someone who holds title to certain property in their name on the record? A. That is correct.

Q. But you or First National would really own the property? A. In cases where she is holding for us.

Q. Yes. In other words, you pay for the property or First National pays for it, but the title, the record title over here in the Recorder of Deeds would be in
228 Esther Eden's name, is that not correct? A. Yes.

Q. And she has done this for many years for you and First National Realty, is that not correct? A. That is correct.

Q. And Esther Eden and First National Realty and Sidney J. Brown, so far as land records in the District of Columbia are concerned, are one and the same, are they not? A. No, they are not.

Q. Well, you are aware, sir, are you not, that this Court has determined that Esther Eden is your straw?

Mr. Hayes: I object to this, if Your Honor please.

The Court: Just a moment. Let him finish the question. Then I will entertain your objection.

Q. And that First National Realty is your alter ego, are you not?

The Court: Now do you wish to be heard?

Mr. Hayes: I object, if Your Honor please.

The Court: I think the records of the court speak for themselves. I don't think you should question the witness concerning what the Court held. If it is of any importance and if it is relevant, you can introduce or you can ask the Court to take judicial notice of the holding of the Court.

229 Mr. Mack: I ask Your Honor to take judicial notice of the holding of Judge Morris of this Court in a memorandum opinion of December 15, 1959 in Civil Action No. 1497-58 captioned Coates v. Sidney Brown and Esther Eden. I have this place marked, if Your Honor please.

The Court: Of course the Court takes judicial notice of all of the court files, but I don't see the relevancy of this matter.

Mr. Mack: My purpose is to show that whatever Esther Eden did on the land records of the District of Columbia was done on the behalf of and for either Sidney J. Brown or for First National Realty.

Mr. Hayes: If Your Honor please—

The Court: Well, let's assume it was. The pending question does not bear upon it.

Mr. Mack: Very well. I will pass on, if I may, to the next question.

Mr. Hayes: If Your Honor please, that statement has been made in the presence of the jury, and I think this is an entirely different case, different parties—

The Court: I would like to know, in view of the disposition of one of the matters at the bench, what relevancy that has, anyway.

230 Mr. Mack: If I may proceed to my nxt question I think it will become apparent, Your Honor.

The Court: Very well. I think it is undesirable for either side to get away from the issues in the case. I know lawyers frequently are tempted to do that and I always try to restrain them.

By Mr. Mack:

Q. Do I understand, Mr. Brown, that the reason that you were angry about being named in the mechanic's lien proceeding that was filed by Mr. Collins is because on February 12, 1964 you were neither legal owner or the equitable owner and had no interest whatsoever in that Queens Chapel property? A. That is correct.

Q. Who owns the property now? A. First National Realty Corporation.

Q. Is it titled in First National's name? A. No, it is titled in the name of Esther Eden.

Q. And is the deed to Esther Eden recorded? A. I believe so.

The Court: Who has title to the property at this time I think is immaterial. We are dealing with events that occurred in early 1964.

231 By Mr. Mack:

Q. The deed to Esther Eden was executed in the year—

Mr. Hayes: If Your Honor please—

The Court: I can't read counsel's mind; I have to let him finish his question.

Q. The deed to Esther Eden was executed in the year 1962, was it not? A. Yes, it was.

The Court: Now just a moment.

The Court will hear you, Mr. Hayes.

Mr. Hayes: If Your Honor please, when I wanted and attempted to go into the question of showing the actual ownership as far as Mr. Kaplan was concerned Your Honor indicated that you did not allow me to do it.

The Court: Do you object to this?

Mr. Hayes: Yes, I do, sir.

The Court: I think this is irrelevant. I will make the same ruling on your objection that I made on Mr. Mack's objection. I think this has nothing to do with the case. Gentlemen, the issue in this case is the alleged defamatory statements which it is claimed the defendant made to

Bonhach by telephone on March 25, 1964. That is the crux of the case and everything else is extraneous.

232 By Mr. Mack:

Q. On February 12, 1964, as I understand your testimony, you had absolutely no interest in this property, is that correct? A. I have answered that several times. The answer is I had no interest in the property itself.

Q. Well, at that time, on February 12, or at any time before, had you agreed to purchase the property? A. Discussions were going on with respect to payment of a bill which was due United Cork—

The Court: No, that is not the question.

Suppose you read the question.

(The Reporter read the last question.)

A. No, I had not.

Q. When Esther Eden takes any action concerning property which is titled either in your name or in First National Realty's name she obtains her instructions as to what to do from you, does she not, sir?

Mr. Hayes: I object, if Your Honor please.

The Court: Objection overruled. You may answer.

A. She does.

Mr. Mack: I have no further questions, Your Honor.

The Court: Very well. You may step down.

233 Mr. Hayes: We have no further questions.

That is our case.

Mr. Mack: I have some rebuttal witnesses, Your Honor, and the first of those witnesses is Mr. Richards.

Alfred Richards

called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

Q. Sir, will you tell us your name and residence? A. Alfred Richards. Arlington, Virginia.

Q. What is your occupation or profession? A. I am a supervisor of the Recordation Tax Unit in the District of Columbia Government.

Q. And among those records that are maintained in your department do you maintain the records concerning taxes on transfers of land, real property in the District of Columbia? A. Yes, I do.

Q. Would you tell us what tax there is on transferring land in the District of Columbia? A. There is a tax of one-half percent on the market value or cash transaction,
234 if there is cash involved, and the tax is one-half percent of the cash paid for a piece of property. Otherwise, it is the market value.

Q. When is this tax normally paid? A. When the deed is recorded at the Recorder of Deeds.

The Court: Your unit is in what department of the District Government?

The Witness: Finance Office.

By Mr. Mack:

Q. Are there any forms that are filled out when deeds are transferred and the taxes collected? A. Yes, there is. There are several different forms.

Q. Have you brought with you in response to a subpoena the forms concerning a transfer by Hyman Kaplan and Elaine Kaplan to Esther Eden, a deed which was recorded—

The Court: You don't have to give the contents of the deed because it has not been admitted in evidence yet.

Q. In connection with lot 1 and square 4259 in the District of Columbia?

Mr. Hayes: Just a minute, please.

I object to it, if Your Honor please.

The Court: This is just a preliminary question, asking a witness whether he has brought a particular paper. Objection overruled. I think the objection is premature.
The document has not been offered in evidence.
235 You may answer.
The Witness: Yes, I have brought that paper.

By Mr. Mack:

Q. Now who is required by the statute or your regulations to fill in the application concerning the transfer tax? That is what it's called, is it not? A. Yes, that is the common name.

I don't know that anyone in particular is required to fill it out. The law requires that both parties sign, unless a waiver is granted by our office for some reason.

Q. And you have produced those records today, have you? A. Yes, I have.

Q. Will you hand them to me, please, sir? A. First I would like to ask the Judge—I would like to bring to your attention, Your Honor, that there is a clause in the regulations, not the law but the regulations as adopted by the Department of General Administration in the District, that these records are confidential and should only be discussed by our office or shown to parties to the deed or other government agencies.

The Court: May I see the document?

The Witness: Yes.

(A document was handed to the Court.)

236 The Court: No, I mean the document itself.

The Witness: I'm sorry.

(Documents were handed to the Court.)

The Court: What section of the regulations?

The Witness: I believe it's Section 9 or the reverse side, down on the bottom lefthand corner.

(Pause.)

The Court: I am going to ask counsel to come to the bench.

(At the Bench:)

The Court: Mr. Mack, this, of course, has the same confidential character, these papers, as, say, income tax

returns. There are times when we require a party to disclose his copy of his income tax returns, but we always observe the sanctity of the original returns as they are, say, in the Office of Internal Revenue Service.

What relevancy is this matter?

Mr. Mack: This is an admission against interest.

The Court: But what is the admission?

Mr. Mack: The admission is that Sidney Brown was the owner on February 12, 1964 and before then, Your Honor, because Mr. Kaplan was holding—

The Court: I think you should have asked Brown
237 on cross-examination.

I never permit—in fact, I think it is the usual practice—the introduction of a document that contradicts a witness' testimony unless the witness is confronted with that document.

You did not ask him about this.

Mr. Mack: No, Your Honor, but I think—

The Court: As a matter of fact, I don't see where it states that Sidney Brown is the owner.

Mr. Mack: Your Honor, it does it in this way: it says there that Mr. Kaplan was holding it for Mr. Brown as a straw. I have not seen it.

The Court: I don't see that this even says that.

Mr. Mack: I haven't seen them. I have only been told what they show, Your Honor.

The Court: I don't see Mr. Brown's name in any way, shape or manner on this paper.

Mr. Mack: It would be in the name of Mrs. Eden, Your Honor, his sister, who is his admitted straw in this property.

The Court: Well, in any event, the regulations make this a confidential document. I will observe the regulation, and also I think it is incompetent in view of the
238 fact that the witness has not been interrogated concerning it.

Mr. Mack: Will Your Honor permit me to recall Mr. Brown at this time?

The Court: Yes, you have a right to recall Mr. Brown if you wish.

Mr. Mack: And not let this witness go, so that I may ask Mr. Brown if he will waive the privilege?

The Court: Very well. However, I don't see Mr. Brown's name listed in this paper.

Mr. Mack: No, Your Honor, it's only by Mrs. Eden, his sister.

The Court: I don't see the Eden name either.

You may recall Mr. Brown if you wish.

Mr. Hayes: May I see the instrument, if Your Honor please?

The Court: And ask this witness to remain in attendance for a few minutes.

Mr. Mack: May Mr. Hayes and I be permitted to examine this document, Your Honor?

The Court: No, because it is a confidential record, just as you couldn't go to the Internal Revenue Bureau and ask for somebody's income tax return.

(In Open Court:)

239 The Court: Will the witness resume the stand.

In view of the fact, Mr. Richards, that this is a confidential document, just as an income tax return is, the Court is not permitting either side to examine it.

Mr. Mack: May I withdraw this witness and call Mr. Brown, so that I may interrogate him concerning the privilege, Your Honor?

The Court: Very well. Do you wish to excuse the witness?

Mr. Mack: Only temporarily, Your Honor.

The Court: Very well. But I want you to get through with this witness before the noon recess because I presume he has to go back to his work. He is a public official and I don't like to see public officials taken away from their work unnecessarily.

Mr. Mack: Yes, Your Honor.

I call Mr. Brown at this time, Your Honor.

The Court: Yes, you may.

Sidney J. Brown

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Further Cross-Examination

By Mr. Mack:

Q. Mr. Brown, at the time the deed from the
240 Kaplans to Mrs. Eden, your sister, was recorded, there was filed a form that is required to be filled out in connection with the transfer tax on that property, was there not? A. I think this is usual, yes.

Q. And in this case it was filled out by Mrs. Eden, is that not correct? A. Well, frankly, I don't remember.

Mr. Hayes: If Your Honor please—

The Court: Well, he answered I don't remember. I will let that answer stand.

By Mr. Mack:

Q. You participated in the preparation of that form either by giving instructions or seeing that it was done, did you not?

Mr. Hayes: If Your Honor please, before any answer is had I would want the record to show that we have objected to it on the ground of irrelevancy.

The Court: Are you objecting?

Mr. Hayes: Yes, Your Honor.

The Court: Objection sustained.

Q. Mr. Brown, what Mrs. Eden did in connection with filing that application for a transfer tax, if it was done by her, was done at your direction, was it not?

241 Mr. Hayes: I object to that, if Your Honor please.

The Court: Well, he has already answered that whatever paper she signed in connection with these matters was done at his direction.

Mr. Mack: Very well, Your Honor.

By Mr. Mack:

Q. Mr. Brown, will you permit us to examine the transfer tax forms that were filed in connection with the transfer of the property, the filing of the deed from the Kaplans to Mrs. Eden, your sister?

Mr. Hayes: If Your Honor please, I object.

The Court: Objection overruled. That is a proper question.

Suppose you read the question.)

(The Reporter read the last question.)

Mr. Hayes: If Your Honor please, I thought that Your Honor had ruled—

The Court: Just a moment. I have overruled the objection.

Mr. Hayes: I thought that Your Honor had sustained my objection on the ground of relevancy.

The Court: Not this one. I overrule this objection because this merely asks whether the witness is
242 willing to permit examining counsel to inspect this particular return.

You may answer.

The Witness: Are you talking about a transfer tax certificate that accompanies a deed, is that what you are talking about?

Mr. Mack: Well, it would be the form, as I understand it from the witness, it would be the forms that are filled in by the person who either buys property or records the deed as to the transfer tax information called for by the D. C. revenue authorities.

Mr. Hayes: If Your Honor please, before he answers may he be allowed to see what it is he is being asked to waive?

The Court: He wants to see what it is?

I want to say this: I think the witness has a right to consult counsel before he answers the question, and if you wish, Mr. Hayes, you may have a brief conference with your client before he answers the question.

Mr. Hayes: The purpose of my—may we—

The Court: Do you wish to have a conference with him or do you not?

Mr. Hayes: Yes, Your Honor.

The Court: Very well. You may step down, and
243 you may have a conference, if you wish.

Mr. Hayes: My inquiry of Your Honor was as to whether or not he might see the instrument.

The Court: Well, he has a right to see his own returns. He doesn't need the Court's permission.

Mr. Hayes: Well, then, may he have a right to see it?

The Court: Mr. Richards is out in the witness room now. You gentlemen may go and inspect the papers, because the regulations specifically state that the person immediately concerned has a right to see the papers.

Mr. Hayes: Well, my only concern is, Your Honor, he was being asked to waive something.

The Court: Please don't waste time unnecessarily, gentlemen.

Gentlemen, will you please sit down. The Court is in session, Mr. Windsor.

You may go ahead to the witness room, if you wish. If Mr. Richards is willing to show you the papers you may see them.

(Following a pause in the proceedings Mr. Richards entered the Courtroom.)

The Court: You will have to take the witness
244 stand.

(Mr. Richards resumed the witness stand.)

The Court: Ask Mr. Hayes to come in, Mr. Windsor.

The witness desires to make a statement. I presume he wants advice from the Court.

Witness Richards: He asked me a question about the returns and said if I wanted to I could ask you if it was all right to answer that question.

The Court: Yes; whatever you consider is proper under your regulations is agreeable to the Court.

Witness Richards: I see.

The Court: You must make your own decision as to what the regulations require.

Witness Richards: Yes, sir, I understand.

Is this Mr. Sidney Brown, may I ask you?

The Court: Yes.

Witness Richards: I think I could talk to him about them.

The Court: Very well.

Witness Richards: Excuse me.

(Pause.)

The Court: Now Mr. Brown may resume the stand.

(Sidney J. Brown resumed the witness stand.)

245 The Court: Are you ready to answer the question? Suppose we have the question read.

(The Reporter read the question as follows:

"Mr. Brown, will you permit us to examine the transfer tax forms that were filed in connection with the transfer of the property, the filing of the deed from the Kaplans to Mrs. Eden, your sister?")

The Witness: No, I will not.

By Mr. Mack:

Q. Mr. Brown, it is a fact, is it not, that when that deed was filed an application was filed at the same time, under oath, stating that there was no tax due because Mr. Kaplan and Mrs. Kaplan at all times were holding the property for you?

Mr. Hayes: If Your Honor please, I object to that.

The Court: Objection overruled. I think this is a permissible question.

The Witness: I didn't file any such affidavit.

Mr. Mack: No, I am not asking you that, sir.
May the question be read back, Your Honor?
The Court: Yes.

(The Reporter read the last question.)

The Witness: I don't know of any such application.

246 By Mr. Mack:

Q. And that application was filed by Esther Eden, was it not?
The Court: He just said that he knows of no such application.
Q. Well, the form, sir, whatever you call it, whether you call it an application or a statement or a form, there was such a document filed, wasn't there? A. I know of no such form filed.
Q. You mean you didn't see it before it was filed? A. I haven't seen any such form.
Q. Now, as a matter of fact, a loan application was filed with the Peoples Life Insurance—
The Court: Just a moment. I think Mr. Richard should be excused.
Mr. Mack: I guess he should be, yes, Your Honor.
The Court: Will you excuse Mr. Richard.
The Deputy Marshal: Yes, sir.
Q. As a matter of fact, a loan application was filed with the Peoples Life Insurance Company here in Washington, D. C. for a loan on this property, was it not?
Mr. Hayes: I object to it, if Your Honor please.
The Court: Objection overruled. I take it that
247 what counsel desires to establish is the existence of contradictory statements.
Mr. Mack: Yes, Your Honor.
The Court: Counsel has a right to establish that, if he can.
Mr. Hayes: Well, if Your Honor please—
The Court: I have ruled, Mr. Hayes. I am going to allow this question.

You know, we can prolong any trial interminably if we argue about every question. The Court rules and the trial goes on.

By Mr. Mack:

Q. Do you recall the question? A. Yes. An application for a loan was filed, that is correct.

Q. And it was filed on January 23, 1964, was it not? A. I don't remember the date, but we were negotiating at that time for the purchase of the property and that sounds like the date that we would have been thinking about it.

Q. Who was negotiating for the purchase of the property? A. I was negotiating with Kaplan for the purchase of the property on behalf of First National.

Mr. Mack: May I have the file in Civil Action
248 1971-64, Your Honor?

By Mr. Mack:

Q. You say you were negotiating in January of 1964? A. That is correct. I'm sorry, you say '64?

Q. Yes. A. No, it would have been '63. I'm awful sorry. Did you say '64?

Q. Yes. There was a loan application, as I understand it, on January 23, 1964 with the Peoples Life Insurance Company. Do you recall that? A. If you say so, I guess you must know the date.

The Court: Let's not quibble over the date. Whether it is the 23rd or the 24th is immaterial. Let's move along now.

Q. This was the mortgage that now exists on the property, was it not? A. I am confused. I don't understand.

The Court: I am going to exclude that.

Q. Isn't it a fact that on January 23, 1964 Esther Eden filed an application for a loan on this property and named herself as owner? A. I don't believe that is true, sir.

Q. And didn't you have a lot of correspondence
249 with Peoples Life—

The Court: I am not going to permit this, Mr. Mack. Unless the document is in the courtroom you may not ask about it.

Mr. Mack: May I ask the witness to bring it in from outside, Your Honor?

The Court: What witness?

Mr. Mack: I believe his name is Quimby, from Peoples Life Insurance Company.

The Court: Yes, you may.

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255 Mr. Mack: May these be marked with the next two plaintiff's numbers for identification, if Your Honor please.

The Deputy Clerk: 6 and 7.

(Peoples Life Ins. Co. loan application marked Plaintiff's Exhibit No. 6 for identification; Document marked Plaintiff's Exhibit No. 7 for identification.)

256 The Witness: Your Honor, may I ask you a question, sir?

The Court: No, I think you better not. Your counsel is here and if you have any questions you should address questions to counsel.

By Mr. Mack:

Q. Mr. Brown, I have laid on the witness table there a loan application dated January 9, 1964. You are aware that that loan—

The Court: Don't characterize or disclose its contents. You have a right to ask him whether he wrote the document, whether he signed it, whether it was signed under his direction, and so on, but don't say anything to disclose its contents, in part or in whole, unless and until it is offered in evidence.

Mr. Mack: Very well, Your Honor.

Q. That document was submitted by you, was it not? A. Yes, it was.

Q. And it was executed by Esther Eden and her husband with your knowledge and consent, was it not? A. Yes, sir.

Mr. Mack: I offer the document in evidence, Your Honor.

257 The Court: Show it to Mr. Hayes, please.

(Pause.)

Mr. Hayes: If Your Honor please, I want to object to it on the ground of relevancy.

The Court: I am going to ask counsel to come to the bench.

(At the Bench:)

The Court: On what theory is this admissible, Mr. Mack?

Mr. Mack: As an admission against interest.

The Court: How is it an admission against interest?

Mr. Mack: An inconsistent statement; pardon me, Your Honor. According to this document on January 9, 1964 there was a loan application made by Esther Eden and her husband as the owners of this property, and Mr. Brown has said that he had no interest in it on this date.

The Court: This doesn't prove that Brown has an interest in the property.

Mr. Mack: He has said whatever she did in the property was done by her on his behalf, Your Honor.

The Court: He didn't say on his behalf. He said at his direction.

I am going to exclude it. I think this is dragging
258 something in by the hair, Mr. Mack. It is too remote.

(In Open Court)

By Mr. Mack:

Q. Mr. Brown, I have laid on the witness table there a document marked Plaintiff's Exhibit No. 7 for identifica-

tion. There is a pink form on top and a white form underneath. The white form underneath was signed by whom, sir?

The Court: Was it signed by you?

The Witness: No, sir, it was not signed by me. It isn't signed, sir. That is why I hesitated.

The Court: Just a moment. That was the only question.

Q. Does Mr. Melvin K. Helnick work for you or one of your corporations? A. I don't even know the name, sir.

Q. Did you obtain a building permit for the premises that United Cork—

The Court: I am going to exclude that.

I am going to ask counsel to come to the bench again.

(At the Bench:)

The Court: I think this is a waste of time. You know, the fact that a person applies for a loan on a piece of property doesn't mean that he pretends to own it. He
259 may be a broker, he may be doing it in somebody else's behalf.

One of the best ways to display a lack of confidence in your own case is to try to bring in far-fetched ideas like that. I am going to exclude this as too remote.

Mr. Mack: The only think I would call to Your Honor's attention is that Mr. Brown is named as the owner in this document, Your Honor.

The Court: Did he sign this?

Mr. Mack: No, it was not signed—

The Court: That is not admissible against him.

* * * * * * * * * *

266 The Court: Now as to No. 1, of course I am going to instruct the jury as to punitive damages. I don't know that I am going to pick out any specific matters as your request No. 1 seeks to do. I am going to instruct the jury that they must find that there is express malice, namely, a desire and intention to harm the person, and so on, and that reckless disregard of the plaintiff's rights may

constitute express malice. I don't want to segregate
267 any specific elements. Counsel may argue all that to the jury.

Mr. Mack: Does Your Honor think that it is inappropriate to deal specifically with the matters of ill-will or pleading the truth?

The Court: I think you have a perfect right to deal with that at your discretion in your summing up, but I am going to say to them that express malice means a desire and intention to harm the person or personal spite, ill-will or hostility towards him, coupled with intent to injure him, and it may also be inferred from a wanton, wilful or reckless disregard of his rights. But I am not going to pick out the specific elements that you suggest in your request. That you have a perfect right to argue in your summing up.

Mr. Mack: I am afraid it will carry a little less weight if I—

The Court: I know, but I am not going to emphasize specific elements, especially punitive damages. I don't believe the Court should indicate whether or not punitive damages should be awarded, and by picking out specific elements the jury might infer an indication. I think the question of punitive damages is entirely in the discretion of the jury.

Mr. Mack: Am I at liberty to say that the jury may consider such elements?

268 The Court: Yes, yes; that is all argument.

I think No. 2 is proper. I will grant that.

Mr. Hayes: If Your Honor please, I don't understand No. 2. What I have been handed is, "The jury is instructed that it is not necessary"—

The Court: I have it before me. What is your point?

Mr. Hayes: I don't understand what it says.

The Court: I take it that this means the person who hears the slander doesn't have to believe it; it is nevertheless defamatory. I think that is what that means.

Although it goes to the measure of damages, Mr. Mack. If a person doesn't believe the slander, I don't think the person who is slandered is damaged very much. However, that is a matter of argument.

* * * * * * * * * *

271 Now do you have anything, Mr. Hayes?

I am going to deny No. 1 because I am going to rule that as a matter of law there is no qualified privilege here. A qualified privilege exists, I take it, where a person may properly inform another of somebody else's deficiencies. For example, if a former employer is asked concerning his experience with a former employee, that is qualified privilege, or if an extending creditor asks information of a person.

This was information, according to the testimony, that was volunteeerd by the defendant unnecessarily.

No, I am going to hold that there is no qualified privilege. Of course I appreciate the reason for your asking for an instruction on that point because you want to save the point.

Mr. Hayes: That is right, if your Honor please.

272 Probably at this time I should also renew my motion because that is a requirement of me as well, to renew my motion, and I would like the record to show that I do renew my motion.

The Court: Your motion to do what?

Mr. Hayes: For a directed verdict at the end of the entire case.

The Court: I am going to deny the motion for a directed verdict on two grounds. First, that there is no qualified privilege. Second, that even if there were, qualified privilege is destroyed by malice and whether or not there is express malice is a matter for the jury.

Now is there anything else?

Mr. Hayes: No, Your Honor.

The Court: Now, Mr. Mack, there is something you said in your opening statement that I think was a bit

inaccurate and that might mislead the jury and confuse the jury. You stated in your opening that there were three types of damages here, special damages, compensatory damages, and punitive damages. That is wrong. There are only two kinds of damages, compensatory damages and punitive damages. Now in arriving at the amount of compensatory damages the jury has a right to consider special damages. Otherwise, the jury might get
273 the idea that there are three verdicts.

Mr. Mack: I will correct that, Your Honor.

The Court: Yes. I am going to instruct the jury, gentlemen, that the question of punitive damages is entirely for them, but that if they do decide to award punitive damages they must separate them from the compensatory damages so that the verdict will show hom much is for compensatory damages, how much for punitive damages.

Mr. Mack: Yes, Your Honor.

The Court: Very well. If there is nothing else we will bring in the jury.

Mr. Mack: May I ask Your Honor what your practice is in permitting counsel to comment on size of verdicts or argue—

The Court: I am glad you mentioned that. I do not permit counsel to mention figures of general damages. We have that in personal injury cases very often. You have a right to mention figures on the special damages, but not on general damages, and for a very good reason: because there is no evidence on which counsel can base an argument as to what the figure should be. Of course that applies to punitive damages also.

Mr. Mack: I recognize that. May I be permitted
274 to comment on the wealth of the defendant?

The Court: Yes, yes, because it seems to be the law that—I personally doubt the fairness of the rule—but it seems to be the law that in determining punitive damages the defendant's means may be considered, and I

have to follow the law. You have a right to comment on that.

Mr. Hayes: Your Honor didn't say so, but I presume that Your Honor is denying the second instruction because it is based upon the first.

The Court: The second one covers the same point, doesn't it?

Mr. Hayes: Yes, Your Honor, it is based upon the first.

The Court: Yes, it covers the question of qualified privilege in another way. I am denying both.

Mr. Hayes: And Your Honor will explain to them with respect to malice and—

The Court: I will instruct them that they may award punitive damages only if they find express malice and I will define what express malice is. It may be, of course, reckless disregard of the plaintiff's rights.

Mr. Hayes: And the prayer which says the statement must be so excessive, intemperate, abusive, as to be
275 any other conclusion than was actuated by express malice.

The Court: I am not going to go that far. I will be glad to tell you now, both of you gentlemen, more or less how I am going to define malice. Express malice means a desire and intention to harm the person concerning whom the defamatory statement is made or personal spite, ill-will or hostility toward him, coupled with a desire to injure him. Express malice may also be inferred from wanton, wilful or reckless disregard of the rights of the person concerning whom the statement is made. Malice being a state of mind, cannot be proven directly because no one can fathom the operations of the mind of another human being. Presence or absence of malice may be inferred from circumstances, form things said, things done, as well as from the surrounding circumstances, and also from the testimony of the person himself as to what his state of mind was. A reckless disregard of the plaintiff's rights may constitute or be a substitute for express malice.

Now I am not going to go as far as to use those rather extreme adjectives. They are a good literary choice of words, but I am not going to use them.

Mr. Hayes: Well, an exception, of course, just for the purposes of the record, as to Your Honor denying it in the form in which it is.

276 The Court: Very well. Anything else?

Mr. Mack: May the Clerk notify me when I have used 30 minutes of my time, Your Honor?

* * * * * * * * * *

278 PROCEEDINGS

* * *

Holtzoff, J.: Ladies and gentlemen of the jury, it is my information that all of the twelve regular jurors in this case are participating in their first trial at this term of court. In view of this fact, before entering into a discussion of this case, I will give you a brief, general explanation concerning your duties and my duties in relation to yours. This may be of assistance to you, not only in this case, but in other cases in which you may be called on to serve during your month of service.

Under the system of jury trials that prevails in the Federal Courts, it is the function of the Court, that is, my function and my duty, to instruct the jury concerning the rules of law that must govern the disposition of the case on trial. You, ladies and gentlemen of the jury, are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hands, the jury decides the facts. You, ladies and gentlemen of the jury, are the sole judges of the facts, and you must decide the facts yourselves on the basis of the evidence, and solely on the basis of the evidence, introduced at this trial.

279 In addition to instructing the jury as to the law, I have a further function to perform, and that is to summarize, discuss and comment on the facts and on the

evidence to the extent to which it seems desirable to do so. But that is done solely in order to aid and assist the jury in arriving at its conclusion on the facts. My summary, discussion or comments on the facts and on the evidence are not binding on you, and you need attach to them only such weight as you deem wise and proper.

If your understanding or your recollection or your view of the evidence in any respect differs from mine, then it is your understanding, your recollection and your view of the facts and the evidence that must prevail, because, let me repeat: The final decision on the facts is solely within your domain. My instructions are binding on you only as concerns the law.

With these preliminary remarks, I am ready to enter into a discussion of the case on trial.

This is an action for slander. That is, the plaintiff claims that the defendant has slandered him by making certain defamatory remarks concerning him which caused him damage.

The only questions for you to decide are: First, did the defendant utter defamatory remarks concerning the
280 plaintiff? If he did not, then your verdict should be for the defendant. If you find that he did, then your verdict should be for the plaintiff.

Then you have also to determine the second question: What amount of damages should be awarded to the plaintiff?

Those are the only two questions for you to determine. Everything else is extraneous.

It often happens in the trial of a case that side issues creep in in the course of the trial, and they have here; but all of these are extraneous and must be set to one side. You must concentrate your minds solely on the issues that I have just stated, namely:

Did the defendant utter defamatory remarks concerning the plaintiff?

And if so, what damages, if any, should be awarded to the plaintiff?

You must reach your conclusion calmly and deliberately, fairly and impartially, solely on the evidence introduced at this trial, without any feeling or emotion, such as either sympathy or anger, and without any bias or prejudice of any kind.

Whenever anyone sues someone else for damages, he has the burden of establishing his claim by a fair pre-
281 ponderance of the evidence. Consequently, the burden of proof is on the plaintiff to establish his claim by a fair preponderance of the evidence.

Now, what is meant by the words, "preponderance of the evidence?"

They may seem a bit formidable to some people. The words, "preponderance of the evidence," merely mean that in order that you may find a verdict in favor of the plaintiff or decide any issue in favor of the plaintiff, you must be reasonably satisfied of the truth of the allegations.

This requirement, of course, does not mean that the plaintiff must produce a greater number of witnesses than the defendant; but, as I have just stated, merely that you must be reasonably satisfied of the truth of the allegations of the plaintiff.

Let me state the same thought in a somewhat different way: "Preponderance of the evidence" means evidence of greater convincing force.

It is the duty of the jury to weigh the evidence carefully, as though on a pair of scales, and to find a verdict in favor of the party in whose favor the evidence preponderates, that is, in whose favor the scale goes down.

If the evidence is evenly balanced, then the verdict must be for the defendant.

282 In determining the issues of fact submitted to you, you will, of course, consider and weigh all of the testimony that has been introduced at this trial, the docu-

ments that have been introduced in evidence, as well as the circumstances concerning which testimony has been given.

Circumstances, at times, cast an illuminating light on oral testimony.

You are the sole judges of the credibility of the witnesses. By that is meant that it is for you, and for you alone, to determine whether to believe any witness, the extent to which any witness should be credited, and the weight that should be attached to the testimony of any witness.

If there is a conflict on any point in the testimony, it is for the jury to resolve the conflict and to determine where the truth lies and what the fact was.

If two or more inferences can be reasonably drawn from some item of evidence, it is for the jury to determine what inference to draw.

In determining whether to believe the testimony of any witness, and in deciding what weight to attach to the testimony of any witness, you have a right to consider any matter that may appear to you to have a bearing on the question.

For example, you have a right to consider the witness's attitude and demeanor on the witness stand, the
283 witness's manner of testifying, whether the witness impressed you as a truthful, reliable individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness had any motive for not telling the truth, whether the witness has any interest in the outcome of this action. All of these matters, as well as any others that may seem to you to have a bearing on the question, you have a right to consider in determining what weight to attach to the testimony of any witness.

If you find that any witness deliberately testified falsely as to any material matter concerning which that witness could not have reasonably been mistaken, then you may, if you see fit to do so, disregard the entire testimony of that witness, or any part of that witness's testimony.

This brings me to a consideration of the specific rules of law that are applicable to the case on trial. As I said to you before, this is known as an action for slander.

Under our law, if a person, without justification, makes a defamatory statement concerning another person, he is responsible for the damages, if any, that he may have caused to that other person.

A defamatory statement is a statement that tends to harm the reputation of another person, so as to lower
284 him in the estimation of the community or to deter other persons from associating or dealing with him.

A defamatory statement may also be defined as a statement that tends to bring another person into contempt, ridicule or disgrace. Any words tending to disparage a person in his employment or occupation or profession or imputing to him acts or conduct that would injuriously affect him in his employment, occupation or profession are defamatory.

I might say to you that if a defamatory statement is communicated in writing, it is libel; and if it is communicated by word of mouth, it is called slander; but the rules of law, as far as this case is concerned, are the same in either event.

This brings me to a consideration of the evidence in this case, and I shall endeavor to summarize the salient features of it very briefly. However, before I do so, I want to remind you of what of what I said at the opening of my remarks, that is, that any summary and discussion of the evidence by the Court is not binding upon you, my comments are not binding upon you. They are intended only to help you. I may overlook some item of evidence that you might consider important. On the other hand, I might mention some item that you may consider insignificant. You
285 must make your own decision on the facts and on the evidence, and you must base it on all of the evidence in the case as you find it to be. That is your function, your duty and your responsibility.

Briefly, the facts are that a concern known as United Cork Companies that had a regional office in Baltimore had done some construction work for corporations, or a corporation, owned or controlled by the defendant, Sidney J. Brown. United Cork Companies claimed that the sum of $25,000.00 was due to it for that work, but that the money was not forthcoming. United Cork, thereupon, turned the matter over to their lawyer in Baltimore. The Baltimore lawyer felt that he had to have a Washington correspondent, and he retained the plaintiff, Mr. Dennis Collins, to handle the matter. This Baltimore lawyer had used and employed Mr. Dennis Collins as his Washington correspondent in other matters previously.

Mr. Collins' instructions, according to the testimony, were to take steps to collect the money due, including the filing of a lien, if necessary, to protect his client's interests.

A lien is a document, ladies and gentlemen of the jury, that may be filed in connection with an indebtedness arising out of work done on some property, and the filing of a lien creates a right to collect that amount out of the property, and such a notice of lien has to be filed within a certain limited time after the work is done. Otherwise, the right to do so is lost.

286

This is really immaterial as far as this case is concerned, but I am giving you this brief explanation in order that you may understand what some of the references to the liens were in the course of the trial.

According to the testimony, Mr. Dennis Collins, the plaintiff, upon receiving the file in this case, made an investigation and filed a mechanic's lien before the time to do so expired.

There has been some discussion back and forth as to whether the proper persons were named in the lien, whether the lien was filed against the proper persons. The lawyers differed as to that. Lawyers frequently differ, just as doctors do. But that is not an issue for you to consider.

The only issue for you to consider, as I explained to you at the opening of my remarks, is whether the defendant, Sidney Brown, uttered defamatory words, made defamatory statements, concerning the plaintiff, Dennis Collins; and, if so, what damages should be awarded.

We now come to the crux of the case: After this lien was filed, according to the testimony, the defendant,
287 Sidney Brown, telephoned by long distance to George Bonhach, who was the regional manager of the United Cork Companies in Baltimore; and in the course of that telephone conversation, the testimony is, made certain statements concerning Dennis Collins which are the crux of this case.

Mr. Bonhach testified as to just what Mr. Brown said to him in that telephone conversation.

Mr. Bonhach said, among other things that:

"He"—that is, Brown,—"informed me that he had had business with Dennis Collins in the past, that Dennis Collins obtained a fraudulent judgment against him in favor of a colored client in the amount of $14,000.00, that Dennis Collins should be sued for malpractice, that Dennis Collins practices bigotry."

He said that the reason Mr. Collins took the case against him was that he was not concerned about the money he would receive as a fee for the case, but that he took it because he had a personal grudge against him, meaning Mr. Sidney Brown.

Mr. Brown also said that this was not his debt, but the debt of the First National Realty Company, and he should not have been included in the lien rights or the lien.

He also said that Dennis Collins saw fit to defame him in the newspapers because of the lien, and that he
288 had sent the whole thing to his attorney for a defamation suit. "I recall very clearly that he said Mr. Collins was anti-Semitic."

After that, Mr. Dennis Collins was discharged from the case in which he had been retained, and another lawyer was

brought in who brought the matter to a successful conclusion and received a fee of $6600.00, according to the testimony.

Mr. Dennis Collins testified that he received no further business from the same source from which he had previously received it in Baltimore.

Mr. Brown took the witness stand, and he admits that he telephoned Mr. Bonhach after this lien was filed, and that he had a conversation with him. He does not admit all of the words attributed to him, but indicates that he is not sure at this time just what he said. At least that is the inference that I draw. You may draw a different inference.

Mr. Brown was asked by plaintiff's counsel:

You told Mr. Bonhach that Dennis Collins was not concerned about the money he was to recover as a fee in the mechanic's lien case, but he had filed the case because he had a personal grudge against you?

"Generally, I said that," Mr. Brown replied.

"And you mentioned a $14,000.00 judgment, did you not?"

289 "Answer: Yes, I did."

"And you used the word fraudulent during that telephone conversation, didn't you?"

"My recollection is I referred to a suit for fraud."

"The question is, did you use the word fraudulent during that telephone conversation?"

"I may have in referring to the type of suit, a suit for fraud."

"Is it your testimony now that you did use the word fraudulent during your conversation with Mr. Bonhach?"

"If I did—and it's possible that I did in the heated conversation. Sometimes you use a word, you want to say a suit for fraud was brought and you might say a fraudulent suit was brought."

It is for you to determine whether the defendant Brown uttered defamatory words or made defamatory statements

concerning the plaintiff, Dennis Collins, to Mr. George Bonhach, the regional manager of the United Cork Companies in Baltimore.

If you find that he did not, your verdict must be for the defendant, of course.

If you find that he did, then you must go a step further and determine the amount of damages that should be awarded to the plaintiff.

290 In a suit such as this, there are two types of damages. The first type is known as compensatory damages. I shall discuss them first.

In an action for slander, the question of what damages should be awarded is peculiarly a matter for the decision of the jury.

In general, damages recoverable in an action for slander are for the plaintiff's loss of reputation in the minds of those who knew him or knew about him, together with his mental suffering as a result of the slander, and any loss to his business or profession.

In this connection the jury may consider the character of the defamatory statements, the possible effect of the language used, as well as the effect which it may be inferred to have had.

The jury may also consider whether the plaintiff's reputation was good in determining the extent to which it may or may not have been damaged.

In general, the jury should arrive at what it regards to be a fair financial equivalent for the derogation or the detraction of the plaintiff's reputation in the community that the defamatory statement may have occasioned.

If the plaintiff has lost any business as a result of the statement, the jury has a right to take such losses
291 into account in assessing the amount of damages.

In this case evidence has been introduced to the effect that as a result of the defamatory statement, the plaintiff, Dennis Collins, was discharged from a case in which he had been hired. Another lawyer superseded him,

and earned a fee of $6600.00 in that case. You have a right to consider that.

You have a right to consider also that the plaintiff has received no further business from the same source in Baltimore from which he had received business from time to time.

You have a right to consider his mental anguish or mental suffering as a result of the defamatory statement and any damage to his reputation.

In considering all those matters, you must arrive at a lump sum of money in dollars which, in your opinion, will fully and fairly compensate the plaintiff for the defamatory statements made concerning him.

So much for compensatory damages.

In an action for libel or slander, the jury has a right, if it sees fit to do so,—and that is entirely within the discretion of the jury—to award what are known as punitive damages in addition to compensatory damages. And if the jury decides to do so, it must indicate separately the
292 amount of compensatory damages and the amount of punitive damages.

Punitive damages may be awarded if the jury finds that the defendant acted with express malice.

As I said before, whether or not to award punitive damages is entirely within the discretion of the jury.

If the jury finds that the defendant acted with express malice, the jury has a right to award punitive damages or not, as it sees fit.

Punitive damages may be awarded as a punishment against the defendant and as a deterrent or an example to others.

The amount that should be awarded for punitive damages, if punitive damages are to be awarded at all, is also entirely within the discretion of the jury.

In determining whether to award punitive damages, and if so, the amount of such damages, the jury has a right to consider all of the circumstances, the motives of the de-

fendant, the intent with which he made the statements, the presence or absence of provocation or reasonable grounds for making the statements, the extent of the injuries sustained by the plaintiff, as well as the financial means of the defendant.

293 As I said, punitive damages may be awarded if the jury finds that the defamatory statements were made with express malice.

"Express malice" means a desire and an intention to harm the person concerning whom the defamatory statement is made for a personal spite, ill will or hostility toward him, coupled with an intent to injure him.

Express malice may be inferred from a wanton, willful or reckless disregard of the rights of the person concerning whom the statement was made.

Naturally, since malice is a state of mind, it cannot be proven directly, because no one can fathom the operations of the mind of another person.

The presence or absence of malice may be inferred from circumstances, from things said and things done, as well as from the surrounding circumstances, and also from the testimony of a person as to what his state of mind was.

A reckless disregard of the plaintiff's rights may constitute or be a substitute for express malice.

In conclusion, ladies and gentlemen of the jury, your verdict should be either a verdict for the defendant or a verdict for the plaintiff.

If you find a verdict in favor of the plaintiff, then you must indicate a specific sum of money that you are
294 awarding as compensatory damages. Then, if you decide to award punitive damages,—and that is your decision entirely—but if you decide to award punitive damages, then you must indicate what amount of money you are awarding as punitive damages, and the two must be separated. That is, if you award punitive damages, you must indicate how much in dollars you are awarding as compensatory damages and how much as punitive damages.

If you decide not to award punitive damages, then you will just render a verdict, if you do render a verdict for the plaintiff, for the amount of compensatory damages.

As of course you are aware, ladies and gentlemen of the jury, your verdict must be reached by a unanimous vote.

Are there any suggestions or objections?

Mr. Mack: No, Your Honor.

Mr. Hayes: I would like to come to the bench, Your Honor.

The Court: You may come to the bench if you have any, Mr. Hayes.

(At the Bench):

Mr. Hayes: I think that Your Honor has already ruled on the question of qualified privilege.

The Court: Yes.

295 Mr. Hayes: But I would want to preserve by raising the issue that Your Honor did not charge with respect to the qualified privilege.

The Court: Surely.

Mr. Hayes: Your Honor also indicated to them that $6600.00 was the amount which was paid to the other attorney.

The Court: That's right.

Mr. Hayes: But I think Your Honor will be reminded that Mr. Collins could not have gotten $6600.00 had he remained in the case.

The Court: I beg your pardon?

Mr. Hayes: He indicated that the maximum amount of his recovery would be twenty-five per cent. This gentleman was in on the thirty per cent situation. And I think that the way that Your Honor left it, it excluded what I had attempted to argue to them, the confines of it—

The Court: I think that $6600.00 isn't much more than twenty-five per cent, is it?

Mr. Hayes: Twenty-five per cent of $22,000.00 would be less than that.

The Court: I don't think I will make any further comment. This was the testimony, and that is for the jury.

Mr. Hayes: All right, sir. I also want to reserve my exception to the fact that Your Honor, with respect
296 to the mechanic's lien situation, has taken the position that that was immaterial. And when the expert was on, Your Honor indicated that this was a matter of law and that if Your Honor saw fit you would charge with respect to it. I think that we are entitled to a charge with respect to the person—

The Court: You think that you are entitled to what?

Mr. Hayes: To a charge explaining the mechanic's lien situation with regard to the record owner, and all, which was a part—

The Court: Oh, I don't think that that is material. I will deny that.

Mr. Hayes: I also feel that Your Honor should have given some charge with respect to the question of truth, because, on the—

The Court: There was no proof of truth here.

Mr. Hayes: Well, in this instance, if they believe that Mr. Brown had said that he was sued by Mr. Collins' clients on the ground of fraud, this would be a truthful situation.

The Court: You made no such request. It came too late. In any event, I don't think that it is relevant. Belief in the truth of a defamatory statement, of course is not a defense.

Mr. Hayes: I beg your pardon, Your Honor?

297 The Court: A belief in the truth of a defamatory statement is not a defense.

Mr. Hayes: No, but it would be true if he made it, if this was a true statement that occurred.

The Court: You offered no proof of that.

Mr. Hayes: Well, I wanted to preserve those points for the record, Your Honor.

(End of the Bench Conference.)

The Court: Ladies and gentlemen of the jury, the twelve regular jurors may now retire.

Upon reaching the jury room, you will first select a foreman who will act as your chairman and will speak for you in rendering your verdict. Then you will proceed to reach a verdict.

Will the regular jurors please follow the Marshal, and will the two alternate jurors please retain their seats for a moment.

(Whereupon, the jury left the courtroom.)

The Court: At this time the Court wishes to thank the two alternate jurors for their participation in this trial. I have no doubt but that you understand the reason why we impanel alternate jurors. At times it happens that, in
298 the course of a trial, some juror might become ill over night or over a weekend, or something else might happen which would make it impossible for him to proceed with the trial. If that happens, we ask one of the alternate jurors to step into the breach and take the other juror's place, and the trial goes on without interruption. If such a contingency arose—and they arise not too infrequently, unfortunately,—and we did not have alternate jurors, we would have to stop the trial, impanel a new jury and start the trial all over again. You can readily realize how inefficient and wasteful that would be. Consequently, in participating in a trial as alternate jurors, you perform as important a function as the twelve regular jurors.

The Deputy Clerk: The alternate jurors are now excused. Please return to the jury lounge.

(Whereupon, at 11:23 a.m., the alternate jurors were excused, and the Court recessed.)

299 (At 12:00 m., the following proceedings were had:)

The Deputy Clerk: Collins versus Brown.

The Court: The Court has a note from the jury, reading as follows:

May the jury review the following:

1. Depositions.

2. All correspondence pertaining to this case.

3. Testimony of Mr. Hartlove, Mr. Brown, Mr. Bonhach and Mr. Collins.

Of course, I am not going to hand them either the depositions or the transcript. I think they are entitled to the exhibits.

If they wish to have any testimony read, I will have it read to them in open court, but I am not going to send in the transcript.

You may bring in the jury.

(Whereupon, the jury came into the courtroom.)

The Court: Mr. Foreman, the Court has received your note, reading as follows:

May the jury review the following:

1. Depositions.

2. All correspondence pertaining to this case.

3. Testimony of Mr. Hartlove, Mr. Brown, Mr. Bonhach and Mr. Collins.

300 Now, taking your second item first, the Court will deliver to you and you may take with you all of the correspondence that has been offered in evidence.

The Foreman: Yes, sir.

The Court: That is, Plaintiff's Exhibit No. 1, Plaintiff's Exhibit No. 2, Plaintiff's Exhibit No. 3, Plaintiff's Exhibit No. 5, Defendants' Exhibit No. 1, Defendants' Exhibit No. 3, Defendants' Exhibit No. 4, Defendants' Exhibit No. 5, Defendants' Exhibit No. 6, Defendants' Exhibit No. 7, Defendants' Exhibit No. 8 and Defendants' Exhibit No. 9.

I will hand them to the Clerk who will, in turn, hand them to the Marshal. Then the Marshal will hand them to the foreman when the jury goes back to the jury room.

So far as the depositions are concerned, I am afraid that I cannot comply with your request, because only small portions of the depositions were read in evidence.

So far as the testimony is concerned, some of the testimony has been transcribed and some has not, because we don't alway transcribe everything as we go along. Therefore, you will have to depend on your memory for the testimony.

However, if you should come to the conclusion that you would like to have any part of the testimony read to you,

I shall be glad to have the Reporter read it to you
301 from the Reporter's notes here in open court.

The Foreman: Yes, sir.

The Court: If you can get along without that, very well. If, however, you decide that you want to have any part of the testimony read to you, you may so notify the Court.

The Foreman: Yes, sir.

The Court: The Court will ask you to go back to the jury room and resume your deliberations.

(Whereupon, at 12:03 p.m., the jury left the courtroom.)

(At 4:45 p.m., the following proceedings were had:)

The Court: Mr. Foreman, the Court has received your note, reading as follows:

May the jury hear the punitive damages instruction.

Of course you may. The Court will be glad to give you the instruction again.

And Mr. Hartlove's testimony.

I will arrange to have the Reporter who was present when Mr. Hartlove gave his testimony here with his notes tomorrow morning. That was a different Reporter than the one who is here this afternoon, so I will have that Reporter read his notes to you tomorrow morning.

Perhaps, under those circumstances, it will be
302 better if I repeat my instructions on punitive damages tomorrow morning instead of now.

I think, under the circumstances, that it might be better for me to release you now and have you come back tomorrow morning.

Am I correct in assuming from this note that you are not about to reach a verdict?

The Foreman: Yes.

The Court: You are not?

The Foreman: We are not.

The Court: Then I am going to release you at this time. You have been working for quite sometime. Perhaps you are weary, and some of you will be wanting your dinner soon. I think it might be helpful for each of you to go home and have a good rest over night and resume your deliberations in the morning. So I am going to excuse you at this time until 10:00 o'clock tomorrow morning.

From the moment you leave the jury box until you get back to the jury room tomorrow morning, do not discuss this case, not even amongst yourselves, and, naturally, with no one else.

Be back in the jury room a few minutes before 10:00 o'clock tomorrow morning. The first thing, when we
303 open court, I will have the Reporter read Mr. Hartlove's testimony to you, and then I will repeat my instructions as to punitive damages.

You may be excused at this time, and please be back in the jury room a few minutes before 10:00 o'clock tomorrow morning.

(Whereupon, at 4:50 p.m., the jury left the courtroom, and the court adjourned until Wednesday morning, April 12, 1967, at 10:00 a.m.)

304 PROCEEDINGS

10:00 a.m.
April 12, 1967.
Washington, D. C.

The Deputy Clerk: Collins v. Brown.
The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Court: Mr. Foreman, the Court understood yesterday that it was the desire of the jury to have the testimony of one of the witnesses read. That was the testimony of Henry Hartlove.

The Foreman: Right, sir.

The Court: The Court has arranged with the Reporter to bring his notes and he will read the testimony to you, ladies and gentlemen, at this time.

(The Reporter read the question and answer testimony of the witness Henry Hartlove.)

The Court: Ladies and gentlemen of the jury, I also understood that it was your desire to have me repeat the instruction and the explanation as to punitive damages and I am glad to do that.

Punitive damages may be awarded by the jury if they find that the defamatory statements were uttered with actual malice or with wanton and reckless disregard
305 of the plaintiff's rights.

Now what is actual or express malice? Express malice means a desire or an intention to harm the person concerning whom the defamatory statement is made or personal spite, ill-will or hostility toward him, coupled with an intent to injure him.

Naturally, malice being a state of mind, it cannot be proven directly because there is no way of delving down into the recesses of the mind of another person and fathoming its operation. Presence or absence of malice may be in-

ferred from circumstances, from things said, things done, as well as from the surrounding circumstances, and also from the testimony of the person himself as to what his state of mind was.

Now whether or not punitive damages should be awarded is a matter entirely within the discretion of the jury. If the jury finds that there was express malice or actual malice or that there was a wanton and reckless disregard of the plaintiff's rights, then the jury may decide whether or not to award punitive damages.

Let me repeat that if you award punitive damages you must separate them from the compensatory damages and specify how much you allow for compensatory dam-
306 ages and how much you allow for punitive damages.

I am under the impression, Mr. Foreman, that that covers your requests?

The Foreman: Yes, sir.

The Court: You may go back to the jury room and resume your deliberations, and I hope that you will be able to reach a verdict very promptly.

(At 10:20 a.m. the jury retired to resume deliberations.)

JURY VERDICT

11:35 a.m.

The Court: You may bring in the jury.

(The jury resumed the jury box.)

The Deputy Clerk: Will the Foreman please rise.

(Juror No. 8.)

The Deputy Clerk: Mr. Foreman, has the jury agreed upon a verdict?

The Foreman: We have, sir.

The Deputy Clerk: Do you find for the plaintiff or for the defendant?

307 The Foreman: We find for the plaintiff.

The Deputy Clerk: In what amount?

The Foreman: Compensatory damages fifteen thousand and for punitive damages thirty thousand.

The Deputy Clerk: Ladies and gentlemen of the jury, please rise.

Ladies and gentlemen of the jury, your foreman says that you find for the plaintiff in the amount of $15,000 compensatory damages, $30,000 punitive damages, and this is your verdict so say you each and all.

Be seated, please.

The Court: Ladies and gentlemen of the jury, the Court wishes to thank you for the time and the attention that you have given to this case. I know it was not an easy case to decide as to the amount of damages.

The Deputy Clerk: Members of the jury, you are excused. Please return to the Jurors Lounge.

Mr. Mack: Your Honor, will the exhibits remain with the Clerk?

The Court: No, you may pick them up. We generally ask counsel to withdraw their exhibits because otherwise in the course of time we would have to buy a new building to store exhibits.

SUPPLEMENTAL JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,170

SIDNEY BROWN, *Appellant*,

v.

DENNIS COLLINS, *Appellee*.

On Appeal From a Judgment of the District Court for the District of Columbia

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

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SUPPLEMENTAL JOINT APPENDIX

Docket Entry

Apr. 10—Trial resumed; same jury and same alternates; motion of defts, First National Realty Corp. & Regional Construction Co., Inc. for directed verdict argued and granted; respited until April 11, 1967. (Reps: G. Nevitt & K. Byrholdt) Holtzoff, J.

EXCERPTS FROM TRIAL TRANSCRIPT

130 Mr. Mack: I wish to call Mr. Brown as an adverse witness under the Federal rules, if Your Honor please.

The Court: You have a right to call him without specifying. You have a right to call anyone.

Sidney J. Brown

Defendant, called as a witness by Plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

Q. Mr. Brown, will you tell us your name and where you live, please? A. Sidney J. Brown. 3125 Beach Street, Northwest, Washington.

Q. How long have you lived in the District of Columbia or the Metropolitan area? A. Approximately 20 years, sir.

Q. And what is your occupation or profession? A. I am a real estate investor and builder.

Q. You say you are a real estate investor and builder? A. Yes, sir.

Q. And do you do this through corporations owned by you? A. I build in coprorations in which I am presi-
131 dent and stockholder with my wife, and I also build for my own account.

Q. Are you a lawyer? A. Yes, I am.

Q. Are you licensed to—pardon me. Are you admitted to practice law in any jurisdiction? A. Yes, I am.

Q. Where are you admitted to practice law? A. All the courts of the State of New York, United States Supreme Court.

Q. And of course you had formal training before being admitted to the New York State Bar, did you not? A. Yes, I did.

Q. Now you are the sole stockholder with your wife of all the stock in First National Realty Corporation, are you not? A. I own with my wife, as a joint tenant, all of the stock of the First National Realty Corporation.

Q. And you and your wife together own all of the stock of Regional Construction Company, do you not? A. That is not correct, sir.

Q. Well, who owns the balance of the stock? A. Mr. Zeiba.

132 Q. How much does he own? A. I would say a very small percentage, which is figured based upon the income of the corporation.

Q. Would it be one or two percent? A. In that neighborhood, yes.

Q. Has the stock ever been issued to him? A. The stock hasn't been issued to anybody.

Q. So Mr. Zeiba, although he is supposed to own stock, has never received it, has he? A. That is right, sir.

Q. And you are president of that corporation, are you not? A. That is correct.

Q. And you are president of First National Realty Corporation, are you not? A. Yes, I am.

Q. Now the name of Beltway Regional Center, the company that originally contracted with United Cork, was changed, was it not, to Regional Construction Company? A. Yes, it was.

Q. And that is all that happened, it was just a change of name? It's the same corporation, the same ownership the same officers, is that not correct? A. Yes, it is.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Filed 6/30/67)

Civil Action No. 1674-64

DENNIS COLLINS, *Plaintiff*

v.

SIDNEY J. BROWN, ET AL., *Defendants*

Notice of Appeal

Notice is hereby given this 30th day of June, 1967, that the plaintiff, Dennis Collins, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 10th day of April, 1967, in favor of the defendants First National Realty Corp., a District of Columbia corporation, and Regional Construction Co., Inc., a District of Columbia corporation, against said plaintiff, Dennis Collins.

/s/ ARTHUR J. HILLAND
Arthur J. Hilland

/s/ JAMES E. HOGAN
James E. Hogan

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,170

SIDNEY BROWN, *Appellant,*

v.

DENNIS COLLINS, *Appellee.*

On Appeal From a Judgment of the District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Did the Court err in refusing to Dismiss the Complaint at the conclusion of Plaintiff's case and/or at the conclusion of the entire case?

2. Were the statements made by appellant absolutely privileged?

3. Were the statements made by the appellant qualifiedly privileged?

4. Did the Court err in admitting testimony that appellant had on a prior occasion complained to the District of Columbia Bar Association about the conduct of appellee?

5. Did the Court err in its instructions to the jury?

6. Did appellee's counsel create through his course of conduct in the trial a highly inflamatory and prejudicial condition which denied to appellant his rights?

7. Was there sufficient evidence to show express malice?

8. Were the compensatory damages excessive?

9. Were the punitive damages excessive?

10. Was the appellee a public official and/or a public figure?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Decisions:

TREATISES AND PAMPHLETS:

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SIDNEY BROWN, *Appellant,*

v.

DENNIS COLLINS, *Appellee.*

On Appeal From a Judgment of the District Court for the District of Columbia

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BRIEF FOR APPELLANT

I. JURISDICTION

This is an appeal from a judgment entered after a jury verdict and a remittitur, said judgment having been entered by the United States District Court for the District of Columbia on the 7th day of June, 1967. The District Court's jurisdiction was invoked by Section 11-521 (a) of the District of Columbia Code (Suppl. III-1964) Jurisdiction of this appeal arises under Section 11-321 (a) District of Columbia Code (Supp. V-1966).

II. STATEMENT OF THE CASE

United Cork Company was engaged by Regional Construction Company, Inc., a general contractor, to do certain construction work. (J.A. 13) Brown, the appellant, was an officer of that company. (J.A. 14) At the termination of the work United Cork Company and Regional Construction Company had a dispute as to the amount of money due for the work done. (J.A. 14) The general sales manager of United Cork Company, Mr. Bonhach, had settlement discussions with Brown.

Brown is a member of the Bar of the State of New York as well as an officer of Regional Construction Company. Mr. Bonhach engaged the services of a Baltimore Lawyer named Hartlove to see what could be done to collect the money claimed. (J.A. 15) Hartlove then engaged the services of the plaintiff. (J.A. 15)

Collins filed a mechanic's lien against the property on which the work had been done by serving Brown, although he knew Brown was not the record owner of said property.

The filing of said lien was exceedingly embarrassing and harrassing to Brown as it was reflected in credit reports concerning him.

Collins did not serve the record owner with the lien. (J.A. 69) Brown upon receiving notice of the lien and after realizing the implications and the legal error of Collins called Mr. Bonhach in Baltimore, Maryland. (J.A. 69)

The conversation that took place is the subject of this controversy. In said conversation Brown is purported to have said Collins "practices bigotry," he should be sued for malpractice, that he is anti-semitic and that he got a fraudulent judgment against Brown for $14,000. As a result of the conversation Mr. Bonhach asked Hartlove for information concerning Collins. (J.A. 23) Hart-

love replied that he did not have time to check and instead he terminated Collin's employment. (J.A. 24) Hartlove did not believe the allegations. (J.A. 41) Another attorney was engaged and the disputed claim was settled for an amount substantially less than that claimed. (J.A. 82)

The plaintiff filed a suit for slander and claimed as special damages the loss of work from Hartlove, more specifically, the collection of the money due from Regional Construction Company. Plaintiff was never clear as to the fee arrangement or what his function was to be in this matter. The plaintiff stated it thusly (J.A. 46):

> "A. I had an understanding that my fee would be a maximum of 25 per cent. I had indicated that it would be around 25 per cent for handling the case."

III. STATEMENT OF POINTS

1. The Court erred in refusing to dismiss the complaint at the conclusion of plaintiff's case and at the conclusion of the entire case.

2. The statements made by appellants were absolutely privileged.

3. The statements made by appellant were qualifiedly privileged.

4. The Court erred in admitting testimony that appellant had on a prior occasion complained to the District of Columbia Bar Association about the conduct of appellee.

5. The Court erred in its instructions to the jury.

6. Appellee's counsel created through his course of conduct of the trial, a highly inflammatory and prejudicial condition, which denied to appellant his rights.

7. There was not sufficient evidence to show express malice.

8. The compensatory damages were excessive.

9. The punitive damages were excessive.

10. The appellee was a public official and/or a public figure.

IV. SUMMARY OF ARGUMENT

1. The Court should have granted appellant's motion to dismiss under the doctrine of absolute privilege.

2. If the Court determined the doctrine of absolute privilege was inapplicable, then the court erred in not instructing the jury with respect to qualified privilege.

3. The Court's instruction and conduct of appellee's counsel created an atmosphere that was not conducive to a fair trial.

4. The verdict was excessive for both punitive and compensatory damages. The remittitur with respect to the punitive damages only reduced a portion of the excessiveness of the verdict. The verdict was a result of passion and prejudice and not calm deliberation.

5. The court erred in the admission of certain testimony including that concerning a certain letter to the District of Columbia Bar Association Legal Ethics Committee.

V. ARGUMENT

1. The Course of the Trial

The trial was permeated throughout by a serious of highly prejudicial statements and acts of appellee's counsel and the Court. Although said actions may have been inadvertent, they created an aura which could only have left unfair, unwarranted, and certainly highly prejudicial thoughts in the minds of the jury. The effect of these matters either individually or collectively was designed to and did in fact result in a prejudicial determination

by the jury against the appellant. The acts complained of are as follows:

(A) Allowing plaintiff's witnesses to testify with respect to the reputation and legal ability of plaintiff but failing to allow defendant's expert witness to show that plaintiff had not done what any lawyer should have done with respect to the legal and proper method for preparing and filing of the mechanics lien. (J.A. 86, 89, 91-92)

(B) The failure of the trial Court to instruct the jury, as it had said it would (J.A. 97-98, 154), with respect to mechanics liens, their operation, effect, and on whom they had to be served and the manner in which the Court stated it thusly (J.A. 147):

> This is really immaterial as far as this case is concerned, but I am giving you this brief explanation in order that you may understand what some of the references to the liens were in the course of the trial.
>
> According to the testimony, Mr. Dennis Collins, the plaintiff, upon receiving the file in this case, made an investigation and filed a mechanic's lien before the time to do so expired.

This statement shows a complete lack of understanding of Brown's case and in fact a complete disregard of same. (J.A. 154) Although the defense of truth was interposed by the appellant, Sidney Brown, to some of the statements made by him, the reference by the Court to such testimony as being "immaterial" negated or minimized the possibility of urging that what was done by the plaintiff with respect to the filing of the Mechanics Lien was designedly done by him and was supportive of the truth of the Brown's statement that Collins was not concerned about money, but had taken steps which did not even protect his client's best interest but rather demonstrated his personal grudge against the appellant Brown. (J.A. 154) This testimony we respectfully submit should

not have been dubbed by the Court as "immaterial". *Washington Times Company* vs. *Bonner*, 66 App. D.C. 280 86 F. (2) D. C. 1936. See also *Manbeck* vs. *Ostrowski*, decided by this Court July 28, 1967, No. 20,203.

(C) Allowing plaintiff's counsel to state in front of the jury that he had two more witnesses to testify as to plaintiff's character and legal ability when he only produced one more such witness. (J.A. 90) The Court itself recognized the prejudicial nature of the statement which was made not once but twice. However, the Court did nothing about said statement. (J.A. 90)

(D) Allowing appellee to place on the stand a government employee as a witness (J.A. 124-129) who was subpoenaed to bring confidential files to the Court-room which appellee's counsel well knew or should have known could not be introduced and then requiring the defendant to refuse to allow those documents to be admitted in open Court. (J.A. 129-132) It was the function of the trial judge to determine whether the material was admissible and the Court erred in allowing the appellant to be interrogated in the presence of the Jury as to his willingness or unwillingness to have examined the recordation form fixing the charge against the grantor and/or grantee when property is sold or transferred. The Court had taken the position, as hereinbefore complained of, that matters having to do with the title to the property were "immaterial". Nevertheless the appellant, Sidney Brown, was called upon to exercise his legal right of determining whether he was willing that the form could be offered in evidence. (J.A. 130) His electing not to allow the form to be displayed to the Jury was beyond doubt to his prejudice in the eyes of the Jury and the verdict rendered evidenced their reaction. As a part of the line of inquiry then indulged in, Brown was asked as to whether or not he was the equitable owner of the property involved. (J.A. 128-130) It is the policy

of the Office of the Recorder of Deeds to treat as confidential information thus obtained from property owners and to reveal same only with the consent of the party involved. To thus require Brown, in the presence of the Jury, to exercise his right not to make the information available to the Jury of necessity allowed adverse inferences to be drawn and was definitely to the prejudice of Brown. *Vogel* vs. *Gruaz,* 110 U. S. 311, 4 Sup. Ct. 12, 28 L. Ed 58 (1884).

(E) The reading into the record not for the purposes of impeachment of a portion of the deposition of defendant when Brown was present and testifying concerning the financial condition of the defendant two years earlier. Defendant was prepared to give his present financial condition which was substantially different. (J.A. 79-80)

(F) The introduction by Collins into evidence, through cross-examination of Brown, of a letter written by Brown to the Legal Ethics Committee of the D. C. Bar Association. The sole purpose for the introduction of said evidence was to inflame the Jury and to increase the "damages". It is true that the Court limited the purpose for which it was introduced to the question of damages and the proof of actual malice. (J.A. 77-78) However, the case most directly in point is the case of *Vogel* vs. *Gruaz,* 110 U. S. 311, 4 Sup. Ct. 12, 28 L. Ed 58 (1884). In this case the defendant approached a State's Attorney in Illinois, (Mr. Cook) and asked him what to do about a particular "criminal" matter. The evidence admitted by the lower Court concerned this conversation. The Supreme Court held it was inadmissible and reversed and remanded even though the same story had been told to other individuals. The Court stated:

> It makes no difference that there was evidence of the speaking of the same words to persons other than Mr. Cook and that the speaking of them to Mr. Cook was not the sole ground of action or recovery. The

> evidence was incompetent, and it must be inferred that it affected the minds of the jury both on the main issue and on the question of damages.

The Court went on to say that the evidence was being excluded not for the protection of the witness or of the party but because of public policy and that said testimony could not be elicited in any manner from any witness.

The issue involved herein is also one of public policy.

The matter involved in the instant case was a letter to the Bar Association. Such a letter has been held to be absolutely privileged as a matter of public policy. *Robinson* vs. *Home Fire and Marine Insurance Company,* 242 Iowa, 1120, 49 NW (2) 521 (1951). *Ramstead* vs. *Morgan*, 347 P. (2) 594 (Oreg., 1959). The same reason for refusing the admission of such evidence in *Vogel* vs. *Gruaz, supra,* would be applicable to this case even to the limited grounds of admission. The Court in *Vogel* vs. *Gruaz, supra,* stated that the inadmissible testimony could not be elicited from anybody or even be brought in by indirection. Appellee's counsel well knew that the letter was absolutely privileged and the use of such material could only have an adverse effect on the usefulness of the Bar Association's Ethics Committee. The introduction of said material was plain error.

(G) The attempt by appellee through the testimony of his witness, Hugh Duffy, to show that Brown had been served with a large number of Court papers by a special process server can only be described as highly inflammatory and prejudicial to the rights of Brown. The sole purpose of this tactic was to inflame the passion and prejudice of the jury. (J.A. 84, 85, 86)

(H) The use of a priest, Father Leo J. McGinn, to testify to the character and reputation of Collins was an

open resort to religious prejudice and this was emphasized when the testimony of the witness, John T. La Saine, is examined. [R. 170] Their sole knowledge of Collins revolved around his church activities. No statement was made by Brown that Collins was not a good Catholic.

(I) The arguments in open Court concerning questions of evidence and the issue of truth as a defense. (J.A. 88, 89, 122)

(J) The Court erred in not allowing Brown to develop the theory of his case. Collins found that the case turned over to him involved a claim against a company in which Brown had an interest. Collins had any eye signal to doing Brown harm because of a personal grudge. Hence, he filed a lien against the wrong property and served Brown and two companies in which Brown had an interest as alleged "equitable owners", but Collins failed to serve Notice of Lien on the record title owner of the property as required. Brown proffered an expert witness who was prepared to testify that it was bad practice, in the filing of a Mechanic's Lien, for a sub-contractor not to name the record owner. The reason being that without notice the record owner might continue payments to the prime contractor and sub-contractors and might in fact even dispose of the property; all of which could be done by the record owner if not notified of the Mechanics Lien. The Court disallowed this testimony on the ground that the Court would take judicial notice of the law involving Mechanics Liens. (J.A. 94-101) It is respectfully submitted that the Court did not properly advise the jury as to the law governing Mechanics Liens and the Jury remained uninformed as to what was a very essential part of the case from Brown's point of view although the Court saw fit to represent that all such matters were immaterial. This was tantamount to a refusal of the Trial Court to allow Brown to show that Collins was not adequately protecting his client's rights.

(J) Upon the opening statement of counsel for the Collins counsel for Brown moved for a directed verdict in favor of the corporate defendants. This motion was at that time denied but was later granted at the close of Collins' case. It is here injected that the joinder of these corporate defendants was a part of a presentation designed to and resulting in prejudicial determination by the Jury against Brown.

2. The Court's Instructions

(A) The Court appropriately advised the Jury that they were the sole judges of the facts to be decided by them solely on the basis of the evidence. (J.A. 142, 143) The Court further stated that his additional function was to "discuss and comment on the facts and on the evidence to the extent to which it seems desirable to do so. But that is done solely in order to aid and assist the jury in arriving at its conclusion on the facts. My summary, discussion or comments on the facts and on the evidence are not binding on you, and you need attach to them only such weight as you deem wise and proper." This is unquestionably a fair expression of the law. However, when practically the only comments which seem "desirable" to the Court are those emphasizing the position urged by Collins, Brown was definitely prejudiced by such a charge.

(B) The Court instructed the jury that the only question for the Jury to decide was whether Brown uttered defamatory remarks concerning the Collins and as to the damages to be awarded and that "everything else is extraneous." (J.A. 143) Under such an instruction the Jury had no possibility of finding that Collins had taken the necessary steps regarding the filing of the Lien and the sending of Notices with respect thereto; not because of the money involved, but because of a personal grudge against Brown. This was the position taken by the ap-

pellant and had the Jury been allowed the possibility of finding this to be true, the truth of such an allegation could have been arguable as a defense to the alleged slander. (J.A. 141) There was a conflict in the testimony as to whether Brown said to Mr. Bonhach that clients of Mr. Collins had sued him (Brown) in a suit for fraud or that he had said that Mr. Collins brought a fraudulent suit against him. Mr. Brown was asked as to whether he used the word "fraudulent" in his conversation. He replied (J.A. 149), "If I did—and it's possible that I did in the heated conversation. Sometimes you use a word, you want to say a suit for fraud was brought and you might say a fraudulent suit was brought."

This statement, in the charge, was immediately followed by the statement (J.A. 149): "It is for you to determine whether the defendant uttered defamatory words or made defamatory statements concerning plaintiff, Dennis Collins, to Mr. George Bonhach, the regional manager of the United Cork Companies in Baltimore. If you find that he did not, your verdict must be for defendant Brown, of course. If you find that he did, then you must go a step further and determine the amount of damages that should be awarded to the plaintiff Collins." This again is a correct expression of the law. But there was no contention on the part of Brown that a conversation was not had with Mr. Bonhach. The question was as to whether or not the words were "defamatory". Brown was entitled to any instruction that removed the language from the category of being "defamatory" by reason of the conditions of qualified privilege surrounding the transaction. Brown was likewise entitled to an instruction as to the truth of an assertion being a good defense. As to some of the allegations the truth was fairly deducible from the circumstances surrounding the making of same. The elimination or curtailment, by the Court, of the producing of

such evidence as would allow the Jury to arrive at the conclusion of truth, and the refusal to charge with respect thereto were plain error on the part of the Court. The above could also have gone to the question of mitigation of damages and the issue of malice.

More specifically the Court in its charge referred to the testimony of the appellee to the effect that he was discharged from the case in which he had been hired because of the defamatory statement made by Brown. The Court made no reference to Brown's testimony, incorporated in the letter from Mr. Bonhach to Mr. Brown, after the time that the lien had been filed, indicating that there was an awareness that the lien had been improperly filed and urging that this be not used as a defense against payment. Had the Court commented on both versions of the testimony, the Jury would, no doubt have taken this factor into consideration and may have found differently as to the issue of compensatory damages.

(C) The Court instructed, "You have a right to consider also that the plaintiff has received no further business from the same source in Baltimore from which he had received business from time to time." Since there was no testimony that there was business which the Baltimore correspondent had which could have been referred, this one-sided comment was forced to have a prejudicial effect. The Court further correctly charged with respect to compensatory damages, "You have a right to consider his mental suffering as a result of the defamatory statement and any damage to his reputation." The Court could have and should have, since commenting on the "desirable" testimony, called attention to the fact that Collins confined his mental suffering to the fact that for several weeks, he worried and was concerned "wondering what he had done that was wrong." (J.A. 49) Each character witness offered testified that no damage had been done to Collins' reputation and that he had and still did bear an excellent

reputation. Such comment was squarely within the province of the Court. However, the Court ended this phase of the charge by saying: "In considering all those matters, you must arrive at a lump sum of money in dollars, which, in your opinion, will fully and fairly compensate the plaintiff for the defamatory statements made concerning him." In its context this might well be taken as a directive; and coming from the Court seemed to leave no alternative, but for the jury to bring back an award.

(D) The Court instructed the Jury that punitive damages could be awarded if the Jury found that the defamatory statements were made with express malice and then defined "express malice". There was no comment as to qualified privilege, which would without doubt have affected the approach of the Jury to this problem, which was outlined to them as being within their discretion. There was no comment as to the defense of truth, which was applicable to some of the statements attributed to Brown and which should have been taken into consideration by the Jury on the question of "express malice". There was no comment on the question of publication—the testimony being to the effect that Brown had no conversation with anyone other than Mr. Bonhach and that under the provoked circumstances of the attack which had been made upon his credit, through what to Brown was the unjustified filing of a mechanics lien against him. There was no comment on the fact that the mere use of harsh words under provoked circumstances does not amount to a slander when the conversation is between two persons having a common pecuniary interest in the matter under discussion. See Newell, Slander and Libel, 4th Ed., p. 875. All of the above factors would be matters of proper consideration before punitive damages should be awarded as same would have negatived express malice should have been brought to the attention of the Jury. *Afro-American Publishing Co. vs. Jaffe*, — U.S. App. D.C. —, 366 F.(2) 649 (1966 D.C. CA).

3. Absolute Privilege

The Court erred in not granting defendant's motion to dismiss plaintiff's complaint at the end of plaintiff's case and then again at the end of the entire case based on the fact that the conversation involved was absolutely privileged and/or qualifiedly privileged. *Robinson vs. Home Fire and Marine Insurance Company, supra:*

> An attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding in which he participates as counsel, if it has some relation thereto. Restatement of the Law of Torts, Section 586, p. 229.

Justice Cardozo stated it thusly with respect to parties:

> There is no difference in respect or degree between the privilege of counsel and that of parties and witnesses. They are phases of the same immunity. *Andrews vs. Gardener,* 224 N. Y. 440, 446, 121 NE 341

Statements made by Brown as an attorney at law or as a party were absolutely privileged as part of a communication preliminary to a proposed judicial proceeding. In the Restatement Torts, Section 587, it is stated thusly:

> *A party to a private litigation* or a private prosecutor or defendant in a criminal prosecution *is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding,* or in the institution of or during the course and as part of a judicial proceeding in which he participates, if the matter has some relation thereto. (Emphasis supplied)

It is not necessary that the defamatory matter be relevant or material to any issue before the Court. It is enough that it have some reference to the subject of the inquiry. *Restatement,* Torts, Sec. 587.

In this jurisdiction it has been recognized that statements made in pleadings are absolutely privileged so long as they have the appearance of or a connection with the case in which they are filed, so that a reasonable man might think them relevant. They do not need to be relevant in a strict sense. *Brown vs. Shimba Bukaro,* 73 U. S. App. D. C. 194, 118 F. 2d 17 (1941); *Young vs. Young,* 57 App. D. C. 157, 18 F. 2d 807 (1927); *Grier vs. Jordan,* 107 A. 2d 440 (Mun. App. D. C. (1954). An affidavit which was used for swearing in a complaint was also considered to be a privileged communication. See *Slater* v. *Taylor,* 31 App. D. C. 100 (1908).

In other jurisdictions even an informal complaint to a magistrate or prosecuting attorney has been held to be an initial step in a judicial proceeding. Prosser Torts 3rd Ed., 800; *Vogel vs. Gruaz,* 110 U. S. 311, 4 S. Ct. 12, 28 L. Ed. 58 (1884).

In *Ramstead vs. Morgan,* 347 P.2d 594 (Oreg. 1959), statements made to a grievance committee of a bar association were held to be absolutely privileged as statements incident to a judicial proceeding even though the complaint did not result in a formal hearing.

And in *Albertson* v. *Raboff,* 295 P.2d 405 (Cal. 1956), the filing of a lis pendens was considered part of a judicial proceeding and thus entitled to absolute privilege.

Numerous other cases have supported a policy of liberally defining what constitutes judicial proceedings. See 30 So. Cal. L. Rev. 107, 108 (1956).

Such matters as letters from defendant's counsel to plaintiff, statements by defense attorney before trial, affidavit by a party prior to a hearing and written statements impugning plaintiff's honesty, filed with an insurance company have all been held to be absolutely privileged. See *Ramstead vs. Morgan,* 347 P. 2d 594, 599.

The case closest in point is that of *Parker* v. *Title and Trust Company*, 233 F. 2d 505 (9th Cir. 1956). There, an insurance company sought to cancel title insurance policies on the basis of fraud. The insured then brought in third-party defendants, the Winans, charging them with fraud in falsely representing to defendants that they were owners of the property in question. The latter in turn cross-claimed for slander charging that defendants told the Title and Trust Company that the Winans had failed to disclose their knowledge of the defective title with the intention that the Company would institute legal proceedings against them. Said the Court at 514:

> The wrongs which the Parkers (defendants) are found to have committed against the Winans family all relate to representations which the Parkers made to the Title Company during the course of settlement negotiations following the Company's discovery of defect in the title. . . .

It thus appears that these representations which the Court found to have been false. . . ., were made in connection with negotiations which contemplated the institution of an action against the Winans.

Relying on the Restatement of Torts, Section 587, and another Oregon case, the Court held that statements made in negotiations contemplating suit were absolutely privileged as "preliminary to a proposed judicial proceeding".

It is submitted that Brown called Bonhach in connection with filing of the lien against him which in light of the liberal interpretation of most Courts would be considered incidental to a judicial proceeding. (J.A. 108). See *Ramstead vs. Morgan, supra; Albertson vs. Raboff, supra.* Moreover, Brown's purpose was to settle a claim against him—to prevent further Court action and the filing of another suit against him, all of which was "preliminary to a proposed judicial proceeding".

Appellee had failed and or refused to discuss the matter in controversy with appellant. Appellee commenced litiga-

tion by filing a mechanics lien and naming Brown as owner of the property. (J.A. 108) Moreover, Brown's purpose was to settle a claim against him—i. e. to prevent further court action and the filing of another suit against him all of which was to say the least "preliminary to a proposed judicial proceeding." We believe that the filing of the mechanics lien was either the commencement of a judicial proceeding or at the most preliminary thereto.

In addition it was the testimony of Mr. Bonhach that Brown had informed him that he had turned over to his attorney the question of a defamation suit against Collins. Therefore, there can be no doubt that this conversation, on at least two counts, falls within the rule cited in the Restatement of Torts, Secs. 586, 587. It should be noted that Brown knew or believed it would be impossible to settle this matter with Collins because of Collins' previous course of conduct. (J.A. 108) Anything Brown may have said was not said for the purpose of defaming Collins (if the words are in fact defamatory) but only for the purpose of settling the dispute without further court action.

The Court's attention is directed further to the fact that all of the statements made by Brown were preliminary to a law suit which he was contemplating against Collins because of the destruction of his credit caused by Collins' filing of the lien. Absolute privilege therefore attached and Brown's statements were absolutely privileged.

4. Qualified Privilege

The statements made by Brown were qualifiedly privileged as made in protecting his interest and/or connected with mutual interest of him and the one to whom the statements were communicated. The general rule as to qualified privilege is set out in 53 C. J. S. Libel, par. 109 (a) as follows:

> Defamatory matter is qualifiedly privileged when published between parties who have a common busi-

> ness interest in the subject matter, but there is no privilege if the communication is made with actual malice, or where the privilege is exceeded.

One of the earliest cases giving rise to the application of this rule in this jurisdiction was *White* v. *Nicolls,* 3 How. 266, 11 L. Ed. 591 (1845). In holding that the trial Court erred in its refusal to submit the libellous material to the jury so that it might determine the existence, vel non, of express malice, the Court stated the rule:

> Whenever the author and publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship as a caution; or a letter written confidentially to persons who employed as a solicitor, conveying charges injurious to his professional character in the management of certain affairs which they had intrusted to him, and in which the writer of the letter was also interested. pp. 286-287 (Emphasis supplied).

Perhaps it should be pointed out here that the effect of privilege is to rebut the presumption of malice. *White vs. Nicholls,* 3 How. 266, 291. The rule of *White vs. Nicholls* was relied on in the case of *Bailey vs. Holland,* 7 App. D. C. 184 (1895). And *Manbeck vs. Ostrowski,* U.S. App. D. C. No. 20,203 decided July 28, 1967

In *Blake vs. Trainer,* 79 U. S. App. D. C. 360, 362, 148 F. 2d 10 (1945) the defense of qualified privilege was lost when the plaintiff established express malice. In so holding the Court stated that "[A] privileged occasion exists when a communication relates to a matter of interest to one or both of the parties to the communication and when the means of publication adopted are reasonably adapted to the protection of that interest." Prosser on Torts (1941), par. 94. This interest includes any law-

ful pecuniary interest such as that in land, intangibles, or business. It is not necessary that the publisher's interest be actually in danger. Restatement of Torts, Section 594. In the case of *Washington Times Company vs. Bonner*, 66 App. D. C. 280 86 F. (2) 836 the Court sand:

> Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only.

The case at bar concerns statements made in essence to the master of Collins and it would seem apparent that under the rule herein cited that this would make said statements absolutely privileged or at least qualifiedly privileged. See *White vs. Nicholls, supra.* The Court erroneously refused an instruction on qualified privilege. (J. A. 152-153.) The Court's attention is further invited to the fact that there was no charge given with respect to the defense of truth and the defendant's theory concerning same. (J. A. 154)

> "Mr. Hayes: I also feel that Your Honor should have given some charge with respect to the question of truth, because, on the——
>
> The Court: There was no proof of truth here.
>
> Mr. Hayes: Well, in this instance, if they believe that Mr. Brown had said that he was sued by Mr. Collin's clients on the ground of fraud, this would be a truthful situation.
>
> The Court: You made no such request. It came too late. In any event, I don't think that it is relevant. Belief in the truth of a defamatory statement, of course, is not a defense.
>
> Mr. Hayes: I beg your pardon, Your Honor?
>
> The Court: A belief in the truth of a defamatory statement is not a defense.
>
> Mr. Hayes: No, but it would be true if he made it, if this was a true statement that occurred.
>
> The Court: You offered no proof of that."

The Court denied our requested instruction with respect to qualified privilege J. A. 141.

The jury charge did not discuss the effect of provocation or the issue of malice in sufficient detail nor in fact did it define malice in a manner which would indicate its true meaning. See *Manbeck vs. Ostrowski, supra, Washington Post Co. vs. Keogh,* —— U. S. App. D. C. ——, 365 Fed. (2) 965. This Court has recently emphasized, and we think properly, the fact that the rejection of the privilege defense is not harmless error. *Manbeck vs. Ostrowski, supra.*

This Court stated in that case:

> With privilege ruled out, the range for evidentiary presentations was narrowed, and argument and instructions to the jury on that subject were scotched. Had the trial embraced privilege, not only could its scope have expanded in these respects, but new considerations would have emerged that might have persuaded a verdict different in both its compensatory and its punitive features.

The Court's incorrectly ruling out the defense of privilege, was prejudicial to the rights of Brown.

> Had the trial embraced privilege, not only could its scope have expanded in evidentiary presentations, arguments and instruction, but new considerations would have emerged that might have resulted in a verdict different in both its compensatory and its punitive feature. *Manbeck vs. Ostrowski, supra.*

Had appellant been permitted to show privilege, "the jury could properly have been made to understand that if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not consti-

tute an abuse of the occasion", and therefore there could be no punitive damages. Restatement Torts, section 603 comment a (1938) quoted in *Manbeck vs. Ostrowski, supra.*

In *Washington Post vs. Keogh,* —— U. S. App. D. C. ——, 365 F. 2d 965, 967 (1966), dealing with a public official, the Court said:

> (M)aliciousness may be shown only through knowledge of falsity or reckless disregard of truth or falsity . . . Actual malice means "publication of false statements with actual knowledge of their falsity or with reckless disregard for their truth or falsity." It was also stated that hostility, vindictiveness or negligent disregard of reputation are not actionable by public officials.

One's reasonable belief in the existence of a qualified privilege goes to the question of privilege and is a question of fact for the jury. *Simon vs. Robinson,* 154 A. 2d 911, 915 (Md. 1959).

Collins is an attorney and an officer of the Court and as such is a public official and/or at least a public figure within the meaning of *Associated Press vs. Walker Curtis Publishing Company vs. Butts,* 18 L. Ed. (2) 1094 (1967).

The jury should have been instructed to take into account the nature of the defamatory statements, the circumstances surrounding same and evidence shedding light on whether Brown acted under provocation or in good faith and with reasonable belief in the truth of the statements. See *Afro American Publishing Company vs. Jaffe, supra;* and *Manbeck vs. Ostrowski, supra.*

The Court is reminded that the Court here did not allow Brown to develop his defense nor in its instruction to the jury did it even let the jury believe that his defense was material. The only evidence of possible malice that Collins produced was the letter to the Bar Association

Ethic's Committee which the appellant believes is inadmissible and that Brown disliked Collins.

In the instant case both Brown and Mr. Bonhach, the person to whom the communication was originally published, had an interest in the subject matter discussed. Both parties wished to settle their controversy. However, Brown felt that the matter could not be amicably and reasonably settled as long as Collins represented Mr. Bonhach's company. Moreover, his credit and that of the Companies' in which he had a financial interest had been greatly impaired by the publication in credit periodicals of the mechanics lien. Certainly the aforesaid interests are just as important, if not more important, than those of union members over whether a $25.00 bill should have been submitted by the slandered attorney. *Manbeck vs. Ostrowski, supra.*

Statements made in reply to a defamatory publication are qualifiedly privileged (Annot. 103 ALR 476, 480) and so are communications in self-defense *Newell, Slander and Libel,* 4th Ed. 456. Here appellant was responding to publications derogating his credit.

There can be no doubt that Bonhach, the only party to whom the publication was made by Brown, had an interest, in the subject matter of the communication. Mr. Bonhach was general manager of United Cork, which had caused a mechanics lien to be filed against the defendants in this cause. He had both a business and a personal interest, by reason of a commission to which he was entitled, and which was affected by the amount recovered. Brown had an interest, both business and personal. Regional Construction Company was involved because of the payment due to United Cork. In attempting to amicably adjust the matter Brown had been required to and had made himself personally liable on notes which had been

executed by Regional and personally endorsed by Brown. The telephone conversation had between Bonhach and Brown, touched upon the impracticality of amicably settling the matter while Mr. Collins was involved as counsel. This would appear to fall well within the rule of qualified privilege and would be controlling as a defense unless express malice was established. See *Ashford vs. The Evening Star Newspaper Company,* 41 App. D. C. 395 (1914), in discussing the question of malice, the Court in that case stated the rule to be as follows:

> "The communication being privileged, defendant will be presumed to have been actuated by pure motives in its publication. In order to rebut this presumption, express malice or malice in fact must be shown. . . . Before the inference of express malice can be indulged, the publication must, in comment, be so excessive, intemperate, unreasonable and abusive as to forbid any other reasonable conclusion than that defendant was actuated by express malice."

It has been decided that strong words are not evidence of actual malice. *Dickins* v. *International Brotherhood, et al.,* 84 U. S. App. D. C. 51, 171 F.(2) 21 (1948). After holding that the defendant was protected by a qualified privilege the Court held that no malice was shown despite the fact that over 450,000 copies of the magazine containing the libelous material was published and distributed. It has been decided that in the absence of extrinsic evidence to prove express malice . . . "if the language of the communication and the circumstances attending its publication by the defendant are as consistent with the nonexistence of malice as with its existence, there is no issue for the jury, and it is the duty of the trial court to direct a verdict for the defendant." *National Disabled Soldiers League vs. Haan,* 55 App. D. C. 243-248, 249, 4 F.(2) 436 (1925).

5. Express Malice

A jury charge in the instant case with respect to punitive damages was granted by the District Court. Thus, there was an implication that the jury could have found express malice. However, the Court's attention is directed to the fact that where matters are qualifiedly privileged, plaintiff must prove actual or express malice on the part of the defendant. *Afro-American Publishing Company* v. *Jaffee*, —— U. S. App. D. C. ——, 366 F. 2d 649, 661 (1966). If a plaintiff fails to offer evidence of an extrinsic character to prove actual malice, and the language and the surrounding circumstances are consistent with non-existence as well as with the existence of such malice, then the trial court has a duty to direct a verdict for defendant. *National Disabled Soldiers League* v. *Haan*, 55 App. D. C. 243, 248, 249, 4 F. 2d 436, 441 (1925); also see *Dickens vs. International Brotherhood, Inc.*, 84 U. S. App. D. C. 51, 55, 171, F. 2d 21 (1948)

The most that can be said is that Brown showed honest indignation and used strong words. This is not evidence of actual malice. *Dickens vs. International Brotherhood, Inc., supra.*

Before the jury can draw an inference of actual malice, the publication must be so excessive, intemperate, abusive and unreasonable as to forbid any other conclusion than that the defendant was actuated by express malice. *Ashford vs. Evening Star Newspaper*, 41 App. D. C. 395, 405 (1914). There is no such proof in this case. While belief of the truth of a defamatory statement is not in itself a defense to an action for defamation, it does go to the question of malice.

6. Punitive or Exemplary Damages

Punitive damages are not favored by the law and the power of giving them should be exercised with great caution. Such an award is extraordinary in nature, only to be used by way of punishment and then only when the conduct

of the defendant clearly shows he is deserving of such special treatment. *Spackman* v. *Ralph M. Parsons Co.*, 414 P. 2d 918 (Mont. 1966); *Wetmore* v. *Ladies of Loretto*, 220 NE 2d 491 (Ill. App. 1966).

The award of punitive damages in a libel action, as in other tortious suits, is dependent on a finding of actual malice or wanton misconduct. *Afro-American Publishing Co.* v. *Jaffe*, — U. S. App. D. C. —, 366 F. 2d 649, 661 (1966).

Such damages should not be assessed unless the alleged libelous statements were "uttered with reckless or careless indifference" to appellee's rights and sensibilities. (T)he nature of the defamatory statement, the circumstances surrounding its utterance, and evidence shedding light on whether appellant 'acted under provocation or acted in good faith and with reasonable belief in the truth of the statement or whether he acted in good faith or with willful, reckless disregard' of appellee's rights"—all may be taken into account by the jury in assessing damages. *Manbeck* v. *Ostrowski, supra.*

Here belief in the veracity of the statement was material, because such an issue goes to malice and the degree of punishment and thus the amount of damages. See *Afro-American Publishing Co.* v. *Jaffee, supra.*

All Courts have a duty to avoid the allowance of excessive damages by the use of remittitur or the granting of a new trial. *Afro-American Publishing Co.* v. *Jaffe*, 366 F. 2d 649 (1966). Therefore, a new trial should have been granted because of the obvious bias reflected in the excessive award of damages.

In *Manbeck* v. *Ostrowski, supra,* the failure of the trial judge to recognize the existence of privilege was prejudicial to the appellant as to damages, including punitive damages.

There was no admissible evidence in this case which would show actual or express malice.

7. Mitigation of Damages

Evidence of the surrounding circumstances should have been permitted on the issue of mitigation of damages. It is generally held that such evidence is a partial defense, tending to reduce general compensatory damages and to negate express malice. *Brush-Moore Newspaper, Inc. vs. Pollitt,* 151 A. 2d 530, 534 (Md. 1959); Restatement Torts, Section 621; Comment C, *Simon vs. Robinson,* 154 A. 2d 911, 915 (Md. 1954)

A defendant in a defamation action may urge any circumstances which will tend to mitigate damages such as evidence that the defendant had reason to believe that the charge was true and the defendant may also show circumstances which induced him to erroneously make the charge. Newell, *Slander and Libel,* 4th Ed., Sec. 779, pages 869-870: also see *McLeod vs. American Publishing Company,* 120 S.E. 70 (S. C. (1923)). Evidence of provocation should be received, as the law makes allowances for infirmities of human nature and for what is done in the heat of passion which is caused by improper conduct on part of the adverse party. Newell, *supra,* at 875. Also see Prosser, *Torts,* 3rd Ed., 828, 829; McCormick, *Damages,* Sec. 119. All of the aforementioned evidence should have been utilized to mitigate damages. Such evidence was either excluded or classified as immaterial by the trial judge.

8. Compensatory Damage

The amounts of both compensatory and/or punitive damages awarded Collins were excessive, as too speculative, unreasonable, and/or unsupported by the testimony.

A plaintiff in a defamation suit is entitled to recover damages which are the natural and direct result of the publication, but not those which are speculative or remote. Prosser, *Torts,* 3rd Ed. 780; 53 CJS *Libel and Slander,* Sec. 240. The jury may consider probable future injury. This rule does not apply where future injury is speculative 53 CJS *Libel and Slander,* Sec. 245. Recovery is

limited to those damages which are regarded as reasonably foreseeable, Prosser *Torts*, 3rd Ed. 780.

The trier of fact may consider such relevant factors as "the character of the defamatory publication and the probable effect of the language used as well as the effect which it is proved to have had. So, too, it may consider the area of dissemination and the extent and duration of the circulation of the publication," Restatement, *Torts*, Sec. 621, Comment C (1938) in *Manbeck* v. *Ostrowski*, *supra*, at note 38.

The amount of damages awarded should be reasonable. The jury should consider a "fair financial equivalent". *Washington Herald* v. *Berry*, 41 App. D. C. 324, 336 (1914). The reasonableness of an award can be appraised in light of the principle that the plaintiff should be given neither more nor less than a sum which leaves him financially whole to the same extent as he would have been had the injury not occurred. *Vanderlind* v. *Wehle*, 144 NW 2d 547 (Minn. 1966). The plaintiff should not be placed in a better position than he would have been in, had it not been for such injury. *Ohio Oil Co.* v. *Elliott*, 254 F. 2d 832 (1962). Also see *Fitzgerald* v. *Hopkins*, 425 P. 2d 920 (Wash. 1967), where total of $15,000 was reduced to $7,500, since $15,000 shocked sense of justice.

If plaintiff wishes to recover special damages as to loss of business or customers, he must prove either the loss of particular customers by name and the actual amount of loss or by general diminution in his business. See *Schoen* v. *Washington Post*, 100 U. S. App. D. C. 389, 391, 246 F. 2d 670 (1957); McCormick, *Damages* 421-422.

On the issue of compensatory damages, Collins testified that his oral understanding as to his employment was that he was to receive "up to a maximum of 25 percent" of the amount recovered by him. The evidence tended to show that the services rendered by Collins prior to the time of his removal from the case were services inci-

dent to the searching of the records at the Office of the Recorder of Deeds and at the Office of the Surveyor to find out as to the description of the property against which a lien was to be placed and an investigation of these records and a conferring with the tenants of the property and the owners as found by him so as to know whom to name and notify in the filing of the mechanics lien. The Court erred and misled the Jury in instructing them that "Another Lawyer superseded him, and earned a fee of $6,600.00 in that case. You have a right to consider that." This, without more, was misleading. The testimony was to the effect that Collins was under an oral contract to be paid a maximum of 25 percent of the amount recovered, with an issue raised by the testimony as to his services being confined to matters incident to the filing of a Mechanics Lien, and his being paid the sum of $150.00 fixed by him as his fee for services up to the time of his removal from the case. Here again, the comment by the Court supportive of the Collins version of the case and a failure to refer in any wise to the position urged and the testimony offered by Brown gave an emphasis which was unfair to Brown.

The conditions under which Collins was removed from the case are respectively reflected by two communications, one a communication offered in evidence from one Henry Hartlove to Collins, dated, to wit, April 14, 1964, reading, in part, as follows: "I sent you a copy of a letter I received from United Cork Companies in which I was questioned as to your character, and your ethics as an attorney. I have been asked to give an immediate answer regarding the allegations of Mr. Brown of the First National Realty Company which were contained in that letter. Mr. Collins, in my dealings with you, I certainly could not believe that these statements are true, but I am not in the position to investigate them. In order that I do not jeopardize myself with my client, I must ask that you withdraw from the case immediately. I have notified United Cork of your dismissal." The other communication,

a letter from one George Bonhach, District Manager of United Cork Companies to the defendant, Sidney Brown, dated February 26, 1964, shortly after the lien was filed and approximately one and a half months prior to the conversation made the basis of this law suit and prior to the plaintiff's removal from the case, read, in part, as follows: "We will agree to take no further action on the lien which we have filed until April 1 if you will not interpose the defense that the lien does not apply to this property. We are interested only in settling this matter in an amicable way, our sole interest being in collecting the just charges that are due us."

The evidence supported the fact that the telephone conversation between Mr. Brown and Mr. Bonhach, on to wit, March 25, 1964, came after the time when Mr. Brown was confronted with the fact that his credit and that of the companies in which he had a financial interest had been greatly impaired by the publication in credit periodicals of the mechanics' lien against him and the defendant corporations rendered impractical the carrying out of the financial arrangements that were then being undertaken to amicably adjust the claim of United Cork Companies.

The plaintiff testified that when called upon to render his bill for services performed to date he submitted same in the amount of $150.00, which amount was paid.

The testimony showed that United Cork subsequently employed one J. Slater Clark, as of who filed suit on the lien and that the case was settled on the trial date, judgment in the amount of $22,000.00 was consented to and Clarke was paid a $6,600.00 fee. Clarke testified that he was employed on a 30 percent contingent fee basis. Without calling attention to the difference in percentages involved and without an explanation of the theory of contingent fees, and forwarding fees, the Court in its charge left the jury, we respectfully submit, under the impression that

the $6,600 paid to Clarke who successfully terminated the case, was a fair measure of damages to be considered by them for Collins.

The Court further instructed the jury under compensatory damages, as to what they had a right to consider. The Court said:

> "In general, damages recoverable in an action for slander are for the plaintiff's loss of reputation in the minds of those who knew him or knew about him, together with his mental suffering as a result of the slander, and any loss to his business or profession."

It is respectfully submitted that nowhere in the Court's charge was there any reference to publication or republication of the alleged slander. The right of the Court to comment upon the testimony is not denied but it is respectfully urged that for the Court to comment only on the parts of the testimony favorable to Collins is inconsistent with the defendant's rights. The testimony of Mr. Hartlove as to further employment was to the effect that he had referred no cases since the events hereinbefore outlined to Mr. Collins. Hartlove did not testify that he had had any additional cases which would have allowed any such referral. He testified that he had had no additional cases from United Cork Companies. Hartlove did not testify that United Cork Companies had had any other legal work which they would normally have referred to him. Indeed, had he so testified, under the evidence in the instant case, the attributable reason would seem unquestionably to have been that the person to whom he had turned over their business had not best protected United Cork Companies' interest rather than that any alleged slander of Mr. Collins by Mr. Brown. Said purported slander could not have had anything to do with the company's relationship with Mr. Hartlove. Aside from any loss which the Jury might properly conclude that Mr. Collins had sustained by being removed from the instant case, any other loss would be pure speculation and unassessable as compensatory damages.

The maximum amount compensable would be 25 percent of $22,000.00 minus $150.00 and less any forwarding fee due Mr. Hartlove. The verdict of $15,000.00 as compensatory damages was not the reasonable calculation of a fact-finding body. But rather it was based upon an unfounded attributing to the defendant of malice, which, if at all, should reflect itself in punitive rather than compensatory damages. In the Court's charge it was stated: "Another lawyer superseded him and earned a fee of $6,600 in that case." You have a right to consider that the contingent fee arrangement of this lawyer was entirely different from that of the plaintiff Collins. *If the Court made this comment, the defendant was entitled to an explanation of the difference in the arrangements made.*

The allowance by the Jury of $30,000.00 in punitive damages is excessive and even with the remittitur to $10,000 said judgment is still excessive, unconscionable, groundless, and reflects an abuse of discretion, and a showing of bias and prejudice against Brown.

CONCLUSION

WHEREFORE, for any and/or all of the foregoing reasons, appellants pray that this Court set aside the verdict and reverse with instructions to dismiss the complaint and/or that this Honorable Court set aside the verdict and reverse and remand for a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,170

SIDNEY J. BROWN,
Appellant,

v.

DENNIS COLLINS,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

In the opinion of appellee, the questions are:

1. Did the Court err in excluding expert testimony as to the law on and usual manner of filing mechanics' liens?

2. Did the Court err in admitting the deposition of appellant?

3. Did the Court err in admitting appellant's letter to the Bar Association which stated appellee "should not be permitted to act as an attorney advising clients?"

4. Did appellant lay any foundation for an appeal concerning the witness Hugh Duffy?

5. Did the Court err in permitting certain discussions in open court and was any foundation for appeal made in the lower court?

6. Did the joining of First National and Regional Construction as defendants with appellant constitute prejudicial error and did appellant lay any foundation for appeal?

7. Did the Court err in its instructions to the jury?

INDEX

TABLE OF AUTHORITIES

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The United Cork Company (hereinafter referred to as United Cork) entered into a contract with Regional Construction Company, Inc. (hereinafter referred to as Regional Construction), whereby United Cork was to do certain construction work at the Rath Packing Company in Washington, D.C. (JA 13) Upon completion of its contractual

obligation, United Cork submitted a bill to Regional Construction which was not paid. (JA 14) Mr. Bonhach, District Manager of United Cork (JA 13), then began negotiations with Sidney J. Brown and a Mr. Zeiba of Regional Construction for settlement of United Cork's claim. (JA 14) For the purposes of enforcing that claim, Mr. Bonhach retained a Baltimore attorney, Mr. Henry Hartlove. (JA 15) Mr. Hartlove then retained appellee Dennis Collins, a Washington lawyer, as his correspondent. (JA 15) Appellee filed a lien on the property on which the work had been done (JA 15, 16), but before doing so, did a thorough investigation in order to determine who the actual owners of the land were. (JA 52-65) As a result of this investigation, appellee concluded that the actual owners of the land were Sidney J. Brown, Regional Construction and First National Realty Corporation (hereinafter referred to as First National). The lien was accordingly filed against these three entities. (JA 47)

On March 25, 1964, about ten days after appellant had received notice of the filing of the lien, he telephoned Mr. Bonhach. (JA 16, 17, 109) Mr. Zeiba, a vice president of Regional Construction, listened to the conversation. (JA 69) It was during this telephone conversation that appellant used defamatory language in regard to the appellee. (JA 17-23) He said:

> "[H]e had had business with Dennis Collins in the past; that Dennis Collins obtained a fraudulent judgment against him in favor of a colored client in the amount of $14,000; that Dennis Collins should be sued for malpractice; that Dennis Collins practices bigotry.
>
> . . . .
>
> "He said the reason that Mr. Collins took the case against him was that he was not concerned about the money he would receive as a fee for the case but he took it because he had a personal grudge against him, meaning Sidney J. Brown.

". . . .

"[H]e said Mr. Collins was anti-Semitic." (JA 17, 19)

As a result of the slander, appellee was dismissed from his representation of United Cork. (JA 24, 35, 39-41)

Appellee brought a slander action naming appellant, First National and Regional Construction as defendants. (JA 2-7) At the end of appellee's case, the trial judge directed a verdict in favor of the two corporations. The jury verdict awarded appellee compensatory and punitive damages. (JA 160-161) It is from the judgment for appellee that appellant appeals.

SUMMARY OF ARGUMENT

I

Appellant has raised many points in his brief for which no foundation was laid in the District Court. This Court should concern itself only with those points for which a proper foundation was laid in the trial court.

A. The trial Court did not err in excluding expert testimony as to the law on and usual manner of filing mechanics' liens. Such testimony was irrelevant because, contrary to appellant's contention, it did not show the truth of any of appellant's remarks and it did not show a lack of good character or legal ability on the part of appellee.

B. The trial Court did not err in admitting the deposition of appellant for a purpose other than impeachment. The deposition of a party to a case may be used by an adverse party for any purpose.

C. The trial Court did not err in admitting appellant's letter to the Bar Association in which appellant stated that appellee should not be permitted to practice law. Such letters are only qualifiedly privileged, and, therefore, are admissible to show malice. If such letters were absolutely privileged, as argued by appellant, the law would in effect be upholding and protecting malicious attacks upon the reputation and livelihood of members of the Bar. Further-

more, when the Bar Association received the letter from appellant, it mailed a copy of it to the appellee. Such a disclosure of the identity of the complainant and the contents of the complaint constituted a waiver of any privilege. Additionally, at the trial level appellant did not claim that this letter was absolutely privileged.

D. The testimony of Hugh Duffy was not prejudicial as claimed by appellant. At trial, appellant objected to Mr. Duffy's testimony concerning a telephone conversation between himself and the appellant, and the Court sustained his objection. Also, appellant failed to lay a foundation at the trial level for an appeal on the ground that Mr. Duffy's testimony was prejudicial.

E. The trial Court did not err in permitting a Priest to testify about appellee's character and reputation. A plea of truth of the defamatory statements, as was made by appellant, permits admission of evidence of good character and reputation.

F. The trial Court did not err in permitting the discussions in open court to which appellant now objects. There is nothing prejudicial to the appellant's case in any of these discussions, and appellant laid no foundation for appeal on this ground.

G. There was no prejudicial error in joining First National and Regional Construction as defendants with the appellant. Appellee had every right to attempt to show that the appellant was acting within the scope of his employment with the two corporations when he committed the slander. Moreover, no foundation was laid for an appeal.

II

A. 1. The trial Court did not err in refusing to instruct the jury with respect to qualified privilege. There was no qualified privilege here because appellant spoke voluntarily about United Cork's choice of counsel, a matter in which appellant had no legitimate interest. Also, the interest which

both the appellant and Mr. Bonhach had in settling United Cork's claim was not such a common interest as would warrant a qualified privilege. This was really an adverse interest because the appellant wanted to settle for as little as possible while Mr. Bonhach of United Cork wanted to settle for as much as possible. If the occasion were qualifiedly privileged, it was so abusively used that any privilege which might have existed was nullified. Furthermore, the jury's award of punitive damages constituted a finding of express malice. Such a finding cured any error which the trial court may have made in refusing to instruct the jury on qualified privilege.

A. 2. The Court did not err in stating that appellee's successor in representing United Cork received a fee of $6,600.00. The Court made this statement while reviewing what it considered to be the salient facts. The Court pointed out that the statement was based on the testimony, that the jury was the sole judge of the facts, and that the jury was not in any way bound by what the Court said in regard to the facts. Also, the difference between $6,600.00 and the amount appellee was to receive under his contract with United Cork was not significant.

A. 3. The trial Court did not err in refusing to instruct the jury as to "the mechanic's lien situation with regard to the record owner." As stated above, the law on and the usual manner of filing a mechanic's lien was irrelevant under the circumstances of this case.

A. 4. The Court did not err in omitting an instruction on truth as a defense in an action for slander. Appellant offered no relevant evidence of truth during the course of the trial, and he failed to make a request for such an instruction.

ARGUMENT

I

The Course of the Trial Was Not Prejudicial to Appellant

Appellant, by raising many points in his brief which he failed to raise in the District Court, seeks to retry his case on appeal. If this Court were to accept the task of deciding issues not raised in the court below, there would be a premium on laxity in the trial of cases and an unnecessary burden upon this Court. *Carson v. Jackson*, (1922), 52 App. D.C. 51, 56-56, 281 F. 411.

In *Martin v. Washington Times Co.*, (1937), 67 App. D.C. 11, 89 F.2d 230, this Court said,

> "[1] . . . At the trial no objection was interposed to the charge of the trial justice submitting this issue to the jury, nor was any prayer offered by plaintiff covering it. This assignment of error is not properly here for consideration, since only errors which are properly assigned and which have been called to the attention of the trial court and a ruling made thereon and exception reserved will be considered on appeal. Cooper v. Sillers, 30 App. D.C. 567, 573; Chaloner v. Washington Post Co., 56 App. D.C. 14, 6 F.2d 721; Walsh v. Rosenberg, 65 App. D.C. 157, 159, 81 F.2d 559. See, also, Boland v. Great Northern Ry. Co., (C.C.A.), 202 F. 485, 487, 488." 67 App. D.C. at 12.

> "On this appeal, appellant objects to the trial court's charge to the jury, but the so-called bill of exceptions does not indicate that he did so at the trial. The objection comes too late. Martin v. Washington Times Co., 67 App. D.C. 11, 89 F.2d 230. It is a salutary rule that errors which the trial court is given no opportunity to correct will not, in general, be considered on appeal." *Donovan v. Brown, et al.* (1941) 75 U.S. App. D.C. 93, 93, 124 F.2d 295.

Also see *Brown et al. v. Rudberg et al.*, (1948), 84 U.S. App. D.C. 221, 171 F.2d 831.

A. It Was Not Error To Exclude Expert Testimony as to the Law on and Usual Manner of Filing Mechanics' Liens.

Appellant contends that in excluding evidence as to the law governing mechanics' liens, the Court precluded the defense of truth. Appellant says that the trial court failed to understand his theory of truth as a defense.

The real problem is that appellant fails to understand the position of the Court in its stand that the evidence appellant offered purportedly to show the truth of his remarks was irrelevant.

Appellant was accused of having stated that the appellee practiced bigotry; that he was anti-Semitic; that he should be sued for malpractice; that he had obtained a fraudulent judgment against appellant; and that he did not file the lien to obtain legal fees, but rather because of a personal grudge against appellant. (JA 17, 19)

The least offensive of all the remarks is that concerning the filing of the lien. On this ground alone, exclusion of evidence as to the truth of that one remark is not prejudicial. No evidence was offered to show the truth of any of the other slanderous remarks. (JA 104-105)

In addition, evidence showing that in filing a lien one normally names the record owners of the land was irrelevant. While it may be the usual practice to name the record owner of the real estate, there is nothing to prevent one from naming those whom he in good faith believes to be the actual owners, as appellee did here. (JA 53-65) This is especially true in cases such as this where straw parties are involved. (JA 53-54, 58, 121-124)

Also, there was a great deal of evidence that appellee had conducted a thorough investigation of the ownership of the land prior to naming anyone in the lien. (JA 52-65) Under such circumstances as these, evidence of the law on mechan-

ics' liens or how one usually files such a lien was so remote as to be irrelevant, as the trial court ruled, (JA 104-105, 147) and involved a matter of law, as the trial court also ruled. (JA 97) Such evidence certainly did not show that the lien was filed as a result of a personal grudge. It was not the same as it would have been if the appellee had made no investigation, if the record owner was obviously the true owner, and if the appellee had impetuously filed the lien against one other than the record owner. Under those circumstances, the evidence offered by appellant might have been relevant, but not here.

Appellant also contends that it was error to exclude evidence of the law on and manner of filing liens where the Court had admitted evidence of appellant's reputation and legal ability. For the reasons stated above, such evidence was so remote that it was irrelevant. Under the circumstances of this case, such evidence did not show bad character or lack of legal ability.

B. The Court Did Not Err in Admitting the Deposition of Appellant.

Appellant contends that it was error to allow appellee to read from the deposition of appellant when done for a purpose other than impeachment. The rule is clear that the deposition of a party, as opposed to a mere witness, may be used by an adverse party for "*any purpose*." Rule 26(d)(2), Federal Rules of Civil Procedure.

> "Moreover, the authorities uniformly agree that this language authorizes the introduction of a party's deposition as independent or original evidence even though that party is present at trial." *Barker v. New*, (1954, D.C. Mun. App.) 107 A.2d 779, 780.
>
> Also see *Community Counseling Service, Inc. v. Reilly*, (1963, C. A. 4 Va.), 317 F.2d 239.

If the appellant wished to rebut or explain his pre-trial testimony, he had the right to do so under Rule 26(f), Federal Rules of Civil Procedure.

C. The Court Did Not Err in Admitting Appellant's Letter to the Bar Association.

Appellant claims as error the introduction into evidence of a letter written by appellant to the Ethics Committee of the Bar Association. This is a letter in which appellant stated that appellee should not be permitted to act as an attorney advising clients. (JA 79)

The letter was offered to show malice and on the question of damages. The Court so limited the purposes of the letter in evidence. (JA 78)

In the District Court, appellant did not claim absolute privilege as he does on this appeal. (JA 78) Appellant supports his contention that the admission of the letter was error with a case of absolute privilege; i.e. *Vogel v. Gruaz*, (1884), 110 U.S. 311, 4 S.Ct. 12, 28 L.Ed. 58. In that case, the defendant had said to the State's Attorney that the plaintiff had committed larceny. The plaintiff brought a slander action against the defendant. During the course of the trial, the State's Attorney was permitted to testify as to what the defendant had said to him, over the objection of the defendant. Judgment was awarded to the plaintiff. Defendant appealed and obtained a reversal on the ground that the information defendant gave to the State's Attorney was absolutely privileged, and, therefore, the State's Attorney should not have been permitted to testify as to what was said to him. This privilege was based on public policy: if informers are to be made known and the information they provide is to be used against them, there will not be any informers, and the task of crime prevention will be made that much more difficult.

Appellee contends that to hold such letters absolutely privileged is to legally condone malicious attacks upon the reputation and livelihood of members of the Bar. There is no logical reason why maliciousness should be legally protected in regard to these matters. Certainly there should exist and does exist a qualified privilege, in the absence of malice, for there is a definite public interest in insuring that

members of the Bar conduct themselves ethically, and one should not have to refrain from reporting what he *in good faith* believes to be a breach of ethical conduct because of a fear of being accused of slander.

Also, there is a definite distinction between the *Vogel* case and the case at bar. When appellant wrote the letter in question, the Bar Association then sent a letter to appellee asking that he respond to the charges made against him. With this letter there was enclosed a copy of the letter appellant sent to the Bar Association. This is the general practice whenever a letter of complaint is received by the Bar Association. If it were not for this fact, appellee would not have known of the letter, who the sender was, and what it stated. Thus, in the case at bar, there was a disclosure made to the appellee of the identity of the "informer" and the information he provided. Such a disclosure should be considered as a waiver of any privilege, if any ever existed.

The Supreme Court decided the *Vogel* case in 1884, and since that time it has rejected the absolute nature of the "informer's privilege":

> "At one time, the informer's privilege was considered to be an absolute one . . . . The absolute nature of this privilege has subsequently been rejected by the United States Supreme Court. In Roviaro v. United States, supra, the Court, while recognizing the existence of the policy behind the privilege, pointed out that the scope of the privilege is limited by its underlying purpose. '. . .[O]nce the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.' " *City of Burlington, Vermont v. Westinghouse Electric Corporation*, (D.C. D.C.) (1965), 246 F. Supp. 839, 843.

The importance of no absolute privilege in regard to such letters is made clear by way of dictum in *Ogden v. Association of United States Army*, (D.C. D.C.) (1965), 177 F. Supp. 498, at page 502, where the Court said:

> "[T]he Court would not be inclined to extend the doctrine of absolute privilege beyond its scope as defined by the Supreme Court, since absolute privilege whittles away one of the most precious private rights protected by law, namely, the right to reputation."

For these reasons, appellee submits the letter was admissible for the purpose of showing malice and on the question of damages.

Appellant states on page 8 of his brief that, "Such a letter has been held to be absolutely privileged as a matter of public policy. *Robinson v. Home Fire and Marine Insurance Company*, 242 Iowa, 1120, 49 N.W. (2) 521 (1951). *Ramstead v. Morgan*, 347 P. (2) 594 (Oreg., 1959)."

There is nothing in the first of those two cases having to do with letters to bar associations. In the *Ramstead* case, the Court did hold that such letters to bar associations are absolutely privileged in a defamation action. However, the Court pointed out that such a privilege was not operable where the plaintiff brought an action for malicious prosecution. 347 P.2d at 600-601. Thus, while the Court verbalized an absolute privilege, it upheld the right of a defamed attorney to receive compensation for a malicious attack via such a letter.

The more reasonable view is that letters of complaint to bar associations are only qualifiedly privileged. *Sassower v. Himwhich*, (Misc.), 236 N.Y. S.2d 491; *Lee v. W. E. Fuetterer Battery & Supplies Co.*, (1929), 32 Mo. 1204, 23 S.W.2d 45.

D. The Testimony of Hugh Duffy Was Not Prejudicial.

Appellant claims as error the appellee's calling of the witness Hugh Duffy to prove a telephone call from and conversation with appellant. Mr. Duffy was unable to state that he recognized appellant's voice. On objection the Court excluded the conversation. Certainly, appellant cannot complain about the Court's ruling in his favor.

Without making the point in the District Court, appellant contends now that what occurred was prejudicial. He did not lay any foundation in the District Cout for an appeal on this ground. He did not move for a mistrial or an instruction to the jury to disregard what occurred. *Conway v. Pennsylvania Grehound Line, Inc.*, 100 U.S. App. D.C. 95, 97, 243 F.2d 39.

E. There Was No Error in Allowing a Priest To Testify to the Character and Reputation of Appellee.

The appellant contends that the use of a priest to testify to the character and reputation of appellee was an open resort to religious prejudice and that this is shown by the testimony of the witness John T. LaSaine. There is no testimony of John T. LaSaine in the Joint Appendix. If appellant wanted to utilize his testimony on this appeal, it should have been included in the Joint Appendix.

No foundation for an appeal on this ground was made in the District Court. Moreover, this Court has held that a plea of truth, which was made by appellant in this case, (JA 89), of the alleged defamatory statements, permits admission of evidence of good character and reputation. *Washington Post Co. v. Chaloner*, (1917), 47 App. D.C. 66, 73-74, 6 F.2d 712.

F. The Court Did Not Err in Permitting Certain Discussions in Open Court.

Appellant complains of the arguments in open court concerning questions of evidence and the issue of truth as a defense. He cites Joint Appendix pages 88, 89 and 122. Most matters appearing on pages 88 and 89 occurred in bench conferences. The only discussion in open court on page 88 was:

> "THE COURT: What is the citation to that case?
>
> "MR. MACK: 47 App. D.C. page 66.
>
> "THE COURT: You may come back to the bench, gentlemen."

On page 89 there is, again, nothing said in open court which could be considered prejudicial to appellant's case.

The District Court's rulings on pages 122-123 were in favor of appellant.

Appellant laid no foundation for appeal on grounds of anything that occurred on the pages to which he has referred.

G. There Was No Prejudicial Error in Joining First National and Regional Construction as Defendants.

It is a well established principle of law that a corporation is liable for damages resulting from slanderous words uttered by an officer of a corporation within the course of his employment. *Aetna Life Ins. Co. v. Brewer*, (1926), 56 App. D.C. 283, 12 F.2d 818, 46 ALR 1499. Also see *Pickford v. Talbot*, (1906), 28 App. D.C. 498 (Affirmed in 1908, 211 U.S. 199, 53 L.Ed. 146, 29 S.Ct. 75); *Norfolk and Washington Steamboat Co. v. Davis*, (1898), 12 App. D.C. 306; *Annotation*, 150 ALR 1338.

Therefore, appellee had every right to name the two corporations as defendants and to show that appellant was acting within the scope of his employment with the two corporations when he committed the slander.[1]

II

There Was No Error in the Court's Instructions to the Jury

A. Appellant Made Four Objections to the Court's Instructions to the Jury. (JA 153-154)

1. Appellant's first objection to the Court's instructions to the jury was that the Court "did not charge with respect

[1] Because of the great amount of evidence showing that appellant was acting for the corporations when he slandered appellee, the appellee has appealed from the judgment in favor of the corporations. (Appeal No. 21,189)

to the qualified privilege." When ruling on the proposed instructions to the jury, the trial judge said: (JA 139)

> ". . . . I am going to rule that as a matter of law there is no qualified privilege here. A qualified privilege exists, I take it, where a person may properly inform another of somebody else's deficiencies. For example, if a former employer is asked concerning his experience with a former employee, that is qualified privilege, or if an extending creditor asks information of a person.
>
> "This was information, according to the testimony, that was volunteered by the defendant unnecessarily.
>
> "No, I am going to hold that there is no qualified privilege. . . .
>
> ". . . .
>
> "THE COURT: I am going to deny the motion for a directed verdict on two grounds. First, that there is no qualified privilege. Second, that even if there were, qualified privilege is destroyed by malice and whether or not there is express malice is a matter for the jury."

The trial Court's ruling was correct. Appellant spoke voluntarily in regard to appellee's selection as counsel, a matter as to which he had no interest that he had a right to protect. The Supreme Court has held that there must be either a duty to speak or an interest which the speaker has a right to protect. *White v. Nicholls*, (1845), 3 How. 266, 286.

Appellant also argues that there was a qualified privilege because he and Mr. Bonhach had a common interest, namely, the settlement of United Cork's claim. While it is true that a qualified privilege is recognized in many cases where the publisher and the recipient have a common interest, *Prosser on Torts*, (1941), 3rd Ed. 805, 806, there was no common interest here, but rather an adverse interest. The goal of the appellant was completely adverse to the goal of Mr. Bonhach, for while the former wanted to pay as little as

possible in settlement of United Cork's claim, the latter wanted to receive as much as possible

Furthermore, even if the occasion were qualifiedly privileged, the improper use of such an occasion nullifies the privilege. *Blake v. Trainer*, (1945), 79 U.S. App. D.C. 360, 148 F.2d 10. Such an occasion is improperly used when there is a lack of belief or grounds for belief in the truth of what is said. *Blake v. Trainer, supra.* In the present case, appellant testified that he did not believe the most offensive statements he was found by the jury to have made. (JA 79) Additionally, the statements made were so unreasonably abusive that they could not be fairly considered as calculated to protect or further any interest claimed by appellant, and, therefore, any privilege that might have existed was abused. *Prosser on Torts, supra,* 809.

The jury was instructed that it might award punitive damages if it found that the defendant acted with express malice. (JA 151) The jury's award of punitive damages constitutes a finding of express malice.

Whether or not slanderous statements are made with express malice is a question for the jury, *National Disabled Soldiers' League v. Haan*, (1925), 55 App. D.C. 243, 248, 4 F.2d 436, and the jury's finding will not be disturbed unless a reasonable man must conclude there is insufficient evidence to support that finding, *Barbour v. Moore*, (1897), 10 App. D.C. 30, 49-51. In the case at bar, there is no such insufficiency. Appellant admitted that he hated appellee, (JA 75) it was shown that appellant had lost a lawsuit in which appellee represented the opposing parties, (JA 45) that appellant wrote to the District of Columbia Bar Association stating that appellee should not be permitted to practice law (JA 78-79), that appellant used abusive and intemperate language (JA 23), that appellant repeated statements containing such language three or four times (JA 24), appellant admitted that his discussion of appellee was "heated" (JA 70) and that he thought it was "fine" that appellee had been dismissed from his representation of United Cork. (JA 74)

Because good faith is an integral element of qualified privilege, the jury's well-supported finding of express malice cures any possible error in the District Court's refusal to instruct the jury as to qualified privilege.

> "We may add that if there was any error in refusing the instruction [on qualified privilege] it is cured by the fact that the jury gave a verdict for punitive damages based on an instruction which properly defined express malice." *Blake v. Trainer, supra.*

2. Appellant objected to the Court's instructions to the jury because the Court "indicated to them that $6600.00 was the amount which was paid to the other attorney." (JA 153)

The Court pointed to the fact that that was the correct amount according to the evidence. Counsel for appellant argued that appellee "could not have gotten $6600.00 had he remained in the case" because the maximum amount of his recovery would have been twenty-five percent. The Court observed that the $6600.00 figure was based on the testimony, that it was a matter for the jury and that he saw no reason to make any further comment to the jury. (JA 153-154)

Appellant overlooks the fact that the trial judge was merely reviewing the testimony of witnesses, (JA 82, 151, 154) that the trial judge had more than once instructed the jury that they were the sole judges of the facts and that they were not in any way bound by what he said in regard to the facts, (JA 142-143, 145, 146) that appellee had testified that he was entitled to a fee of up to 25 per cent of any recovery, (JA 46) that the difference between $6,600 and twenty-five percent was not significant, (JA 153) and that in awarding compensatory damages of $15,000, the jury took into consideration not only the fee that appellee lost but also the damages to appellee's reputation, appellee's mental anguish, and appellee's loss of professional income. Considering all these elements, the award of $15,000 is certainly within bounds of reason. Thus the trial judge's re-

view of testimony to the effect that appellee's successor received $6,600 was not improper and was not in any way prejudicial.

3. Appellant objected on the further ground that the instructions did not explain "the mechanic's lien situation with regard to the record owner." Counsel for appellant did not tell the trial judge what he wanted the jury instructed in that regard. The Court ruled that the subject of the objection was immaterial. (JA 154) The Court's ruling was correct for the reasons stated in Section IA of this brief.

4. Appellant objected to the omission to charge the jury "with respect to the question of truth." The Court overruled the objection. The Court remarked that counsel for the appellant made no such request and it came too late, that "There was no proof of truth here," that "A belief in the truth of a defamatory statement is not a defense," and "I don't think that is relevant."

It will be observed from the foregoing, which covers all of appellant's objections to the instructions, that appellant's brief on the subject of the Court's instructions goes far beyond any foundation that was laid in the trial court.

We have already shown that the Court's ruling that there was no qualified privilege is correct. Moreover, qualified privilege, if it ever existed, was destroyed by the verdict of the jury.

The trial court's instructions to the jury made it very clear to the jury that they were the sole judges of the facts and that the Court's summary, discussion or comments on the facts and on the evidence were not binding on them. (JA 142-143, 145, 146)

During the course of the testimony, (JA 96-97) the trial judge ruled that the testimony about the mechanic's lien law was immaterial. We have already shown in Section IA of this brief that the Court's ruling was correct.

We respectfully submit that the Court's rulings with respect to the question of truth, as stated above, were cor-

rect. The request for the instruction came too late. Counsel for appellant did not inform the Court what the appellant wanted the Court to say to the jury on the subject of truth. Moreover, as the Court observed, there was no proof of truth, it was not relevant and a belief in the truth of a defamatory statement is not a defense.

CONCLUSION

It is respectfully submitted that for the reasons stated herein there was no reversible error, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term 1968

DENNIS COLLINS :
Plaintiff :

vs.

No. 21,170
United States Court of Appeals
for the District of Columbia Circuit

SIDNEY J. BROWN et al :
Defendant :

FILED SEP 10 1968

Nathan J. Paulson
CLERK

PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Sidney J. Brown, defendant-appellant, presents this petition for a rehearing in the above-entitled cause, in support thereof respectfully shows:

I

The appellate Court, in its opinion of affirmance herein, has clearly failed to apply the general rule that if an issue is raised at the trial level and utilized as a grounds for appeal, such grounds must be passed upon by the appellate tribunal in making its decision.

II

The appellant, at the trial level, as clearly indicated by the trial record (T. R. 185), raised the issue of privilege by a timely motion. The motion was overruled by the trial judge who said, "I am going to rule that this is not a privileged occasion."

III

Although absolute privilege was not specifically raised by appellant at the trial, it can be seen to have done so would have been a useless gesture. If the trial Court overruled conditional privilege, it most certainly would have overruled absolute privilege. Therefore, appellant contends that it is error for the appellate tribunal to dismiss the contention of absolute privilege on the basis of the failure by plaintiff to raise such issue at the trial level.

IV

The appellate Court further erred in Footnote 10, page 7 of the appellate Court's opinion in stating that "no claim is made that the lien was ineffective as a means of reaching whatever interest Brown, First National and Regional had in the property." Counsel had, in fact, as noted on page 9, section J of appellant's brief, attempted to present an expert witness to testify and establish as to the lien's defectiveness, but was denied the opportunity by the appellate Court's disallowal of the testimony on the ground that the Court would take judicial notice of the law involving Mechanics Liens, (J.A. 94-101), although the Court never actually did as it said it would.

In addition, as stated on page 5, section B of appellant's brief, the appellate Court erred by failing to properly advise and instruct the jury, as it said it would at the time of the disallowal of the expert witness, with respect to the law governing Mechanics Liens, their operation, effect, and on whom they had to be served.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and judgment of the District

Court be, upon further consideration, reversed.

BY Harvey Rosenberg

Harvey Rosenberg
Attorney for the Defendant
1001 Spring Street
Silver Spring, Maryland
588-3033

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, this 23rd day of August, 1968, a copy of the foregoing Petition for Rehearing, to Arthur J. Hilland, 921 Cafritz Building, 1625 Eye Street, N. W., Washington, D. C., 20006, attorney for the plaintiff.

Harvey Rosenberg

Harvey Rosenberg